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Paul Gottfried — On Liberal and Democratic Nationhood

Murray N. Rothbard — Introduction to the French Edition of *Ethics of Liberty*

Jeffrey A. Tucker and Llewellyn H. Rockwell, Jr. — The Cultural Thought of Ludwig von Mises

Bruce L. Benson — Reciprocal Exchange as the Basis for Recognition of Law: Examples from American History

James P. Philbin — An Austrian Perspective on Some Leading Jacksonian Monetary Theorists

Walter Block — Levin on Feminism and Freedom

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Paul Gottfried	1	On Liberal and Democratic Nationhood
Murray N. Rothbard	11	Introduction to the French Edition of *Ethics of Liberty*
Jeffrey A. Tucker and Llewellyn H. Rockwell, Jr.	23	The Cultural Thought of Ludwig von Mises
Bruce L. Benson	53	Reciprocal Exchange as the Basis for Recognition of Law: Examples from American History
James P. Philbin	83	An Austrian Perspective on Some Leading Jacksonian Monetary Theorists
Walter Block	97	Levin on Feminism and Freedom

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The Journal of Libertarian Studies, Vol. X No. 1 (Fall 1991)

On Liberal and Democratic Nationhood

by Paul Gottfried*

The consubstantiality of liberalism and democracy has become a modern religious dogma. It is a doctrine transcending established political divisions, and ever since the de-Sovietization of Eastern Europe that began last year American journalists of otherwise differing ideological persuasions—Jeanne Kirkpatrick, Robert Novak, Ben Wattenberg, Michael Kinsley, Charles Krauthammer, Richard Cohen, and Jim Hoagland, for example—have urged the American government to nurture the seeds of liberal democracy in Eastern Europe.[1] The synthesis for export should consist of democratic elections, the availability of equal citizenship to all residents of a country, the separation of church and state, markets open to foreign investment, the introduction of at least limited market economies, and enthusiastic concern for the steadily expanding list of what are styled "human rights"

Distinctions between "liberalism" and "democracy" have obviously grown passé, so much so that usually intelligent political theorists blur them without hesitation. In the May 1990 issue of *Society,* the Polish scholar Leszek Kolakowski, who holds professorships at both Oxford and Chicago, warns against nationalism's alliance with "spurious and fraudulent" concepts of democracy. Among the concepts Kolakowski fears nationalists may stray into are democratic socialism and theocracy. He thus seeks to remind his readers that democracy is incompatible with these phenomena. Rather it finds its essence in the erection of a "legal system, to guarantee both the equality in law of all citizens and the basic personal rights which include . . . freedom of movement, freedom of speech, freedom of association, religious freedom, and freedom to acquire property."[2]

It may be argued that Kolakowski confounds democracy with liberalism, concepts traditionally viewed as at least discrete and possibly contradictory.

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In the nineteenth and early twentieth centuries political and social theorists, including Walter Bagehot, Max Weber, Vilfredo Pareto, and Carl Schmitt, drew exacting distinctions between the two. Democracy, for most of these thinkers, had to do with political and eventual social equality or homogeneity for all members of a particular polity. It treated self-government only as an instrumental good, directed at the removal of class barriers and the creation of material security for what Aristotle saw as the backbone of democracy: the *aporountes,* or self-identified have-nots. In *Politik als Beruf* Weber notes that modern democracy has been accompanied by the growth of managerial government, a correlation he holds to be self-evident.[3] Democratic societies expect to be looked after and therefore support bureaucratic expansion as the entirely acceptable price of security. Liberals, by contrast, favor more limited government, ringed by constitutional barriers and existing only to protect life and property and to enforce legal procedures.

Carl Schmitt's distinction between liberal legality and democratic legitimacy may help to highlight this point. Liberals, according to Schmitt, accept the eighteenth-century notion of a self-ordered universe, which they transfer to political affairs. The liberal society, like the Deistic universe or the Newtonian cosmology, is designed to look after itself, once generally acknowledged rules allow people to live and enrich themselves in peace. Governance, from this liberal perspective, entails procedural norms that once properly applied produce a self-regulated civil society. Democracy, by contrast, invokes popular sovereignty, by which democratic governments legitimate themselves.[4] Such regimes do not appeal to pale legality but work to become the total states desired by the multitudes that turn to them for security and guidance. Though I myself in a recently published book criticize the rigidity of Schmitt's conceptual definitions, there is certainly value in the contrast that he makes between democratic, i.e., popular-activist, and liberal, i.e., proceduralist-nonegalitarian, governments.[5]

In fact an act of unlearning may have been necessary—reminiscent of Heidegger's reference to bad philosophy as τό ληθέν, knowledge of being that has slipped into a "memory hole"—to speak now blithely of liberalism as democracy or of "democratic capitalism." Capitalism, like private property, strictly interpreted legal procedures, and franchises restricted to property holders, is a mere vestige of a pre-democratic age, a vestige now increasingly saddled by taxes and hiring and therapeutic regulations imposed by government. Such forms of nationalization are not "undemocratic," even when they may be imprudent. Democracies do not protect inequalities of

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wealth; rather they seek ways of eliminating them, even if they rarely succeed and only produce in the end further circulations of elites. Semantical confusion may come from the fact that militant democrats have appropriated the terms "liberal," and more recently, "capitalist," to describe the welfare state. Thus Michael Novak in *The Spirit of Democratic Capitalism* devotes an entire volume to identifying capitalist men with a democratic welfare regime. The terms "capitalist economy" and "mixed economy" are here used interchangeably, and democracy is presented as the only form of government fully congruous with the "capitalist spirit."[6]

But the same terminological difficulty can likewise be found in the works of two indisputably liberal theorists, Ludwig von Mises and F.A. Hayek. A classical liberal economist and critic of social equality, Mises states that "political democracy and economic democracy condition one another. A democratic constitution is the political corollary either of a primitive community of the owners of family farms or of a market economy." Significantly, Mises characterizes a market economy based on the inviolability of property as "the full and only possible realization of the principle of economic democracy," whose "corollary is political democracy."[7] This assertion is historically untrue. Political democracy has resulted in a weakening of the liberal constitutionalism that Mises admires and which prospered with electoral restrictions and greater social stratification in the nineteenth century. As for calling a market economy "economic democracy," most industrial democracies have moved away from Mises and his followers. "Democratic economies" are those that characterize political democracies, which are usually social democratic in their economic form. Mises here takes his own fine point, that socialist economies may be more oligarchic in practice than liberal ones, for the way in which the world actually works. In the real world, for better or worse, democratic peoples do not take seriously Mises's observation, and show their democratic character differently from the manner in which he would like. John Lukacs, in a recent *Harper's*, uncovers the consequences of modern democracy more accurately than Mises when he writes, "traditional capitalism is gone in the West, even from the United States. The universal attribute of every country in the world is the welfare state, administered by large bureaucracies. We are all socialists now whether we call ourselves that or not."[8]

Hayek tries to hide precisely this truth by presenting a self-limiting democracy in *The Constitution of Liberty*. Hayek, who quotes Schmitt

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without doing justice to his view, there defends democracy as the indispensable foundation of a liberal society. Democracy contributes popular legitimacy, a mystique that voters can then bestow on liberal institutions.[9] Hayek considers but also dismisses the unsettling hypothesis that democratic electorates may change the rules to favor *their* interests or to plunder the wealthy. He prefers to contemplate a happier, albeit more fanciful, situation: a society of liberal legalists that uses democratic means to affirm its liberalism. Hayek assures his liberal readers that they may have their cake and eat it at the same time. Democracy will be there to provide popular sovereignty, but legal procedures and reverence for inherited laws will keep both lives and property protected.[10] Like Luther's view of Catholic grace, Hayekian democracy is a super-added merit that enhances without changing substantively what it touches. And, like other arguments made by classical liberals in our century, Hayek's comments on democracy are a strategic response to an accomplished fact. It is one that real liberals dislike but hope to manipulate *faute de mieux.*

The dialectic between liberalism and democracy and the latter's gradual victory over the former throughout the Western world has determined many political questions, including the fate of nationhood. Nationhood in a democratic age will naturally be different from nationhood as understood by liberals. To be sure, few nineteenth-century European advocates of national unity were libertarian legalists; nor have all twentieth-century natinalists been raging levellers and brutal collectivists. But there have been critical social and cultural differences between spokesmen for nation states in the two centuries. It was the bourgeoisie that, by and large, defined nationhood in nineteenth-century Europe and combined it with constitutional frameworks and a principle of limited sovereignty. The European bourgeoisie did not create nation states. Kings and royal ministers did, from the late fifteenth century down to the unifications of Italy and Germany in 1870 and 1871. What bourgeois constitutionalists and the professional and commercial classes did was to link nationhood to the political representation of the educated and propertied. The followers of Vittorio Emmanuele and Count Cavour in the Italian *Risorgimento,* the *haut bourgeois* backers of the July Monarchy, and the National Liberals, Right and Left, in the German *Reichstag* after 1871 all exemplified, in varying degrees, the liberal concept of nationhood.[11]

Such liberals did not trust the lower classes and were demonstrably happier to leave power with kings and princes than with handworkers. They

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also rushed to compromise at critical junctures with those in authority, and thus have not been spared the tirades of those on their left. The English historian Denis Mack Smith has written voluminously on the parliamentary corruption of the liberal monarchists who unified Italy. The same kind of exposé has been applied to the Protestant liberal nationalists who dominated Hungarian politics after the establishment of the Dual Monarchy in 1867. And an entire library would be necessary to house the books and pamphlets published on the antidemocratic iniquities and sellouts to Prussian authoritarianism ascribed to the German National Liberals.

The German case is the one I know best and will discuss for the purposes of clarification. Aside from the sanctimonious and frenetic tone of much of the invective against the National Liberals, the attacks on them have often been anachronistic. We are made to believe that Rudolf Bennigsen and other National Liberal parliamentary leaders of the 1870s and 1880s were reckless reactionaries because they sided with Bismarck against the Socialists. National Liberals, for example, voted mostly with the imperial government to ban the Socialist Party after the attempted assassination of the German Emperor by a Socialist in 1879. Though the Socialists spoke of class conflict and social revolution, according to Fritz Stern, Hajo Holborn, and other German historians, the German middle class should have backed them as the party of social progress. The Socialists, we are told, were a democratizing force in the Second Empire, and the liberals erred by not rallying to them.[12] But the term "liberal" in the nineteenth century was not synonymous with "democratic," and connoted something entirely opposed to socialism. Nineteenth-century continental liberals saw themselves as the party of property and education, defending the political *juste milieu.* Many of them opposed international free trade while favoring the removal of custom barriers within their own countries, though the German National Liberals were less supportive of tariffs than most other parties in the *Reichstag.* German liberals also generally favored academic and religious freedom, with more restraints, though, than might today seem permissible to the A.C.L.U.[13]

In a sweeping misstatement Alfred Cobban has contrasted two forms of nineteenth-century nationalism, the "liberal democratic" associated with France and the U.S. and the "authoritarian reactionary" embodied by Imperial Germany.[14] Though the empire forged by Bismarck was not quintessentially liberal (certainly less so than Victorian England) and left undoubtedly too much discretionary power to the Emperor and his cabinet,

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it was in significant ways less of a total state than the democracies of the twentieth century. It was, first of all, a federal union, in which various kingdoms, duchies, and free cities continued to rule themselves internally after 1871. The other German governments united under Prussia to form the German Empire; they were willing to recognize the Hohenzollern King of Prussia as the German Emperor, but never as Emperor of Germany. And German jurists and civil servants revelled in the view of their regime as a *Rechtsstaat,* a government in which all subjects were equally under the same law.

In World War I, the German record of allowing dissent compares quite favorably with that of Republican France and of Woodrow Wilson's America.[15] Unlike France, in which political leaders were jailed for merely proposing a negotiated resolution to the war, or the United States, in which the government whipped up hysteria against German Americans before entering the conflict, outspoken opponents of the war in Germany sat in the *Reichstag* unmolested. The imperial government allowed debate on how the war might be ended, and it even encouraged socialists to use foreign contacts in pursuing a peaceful outcome. With good reason, Carl Schmitt observed that Imperial Germany fought World War I as a *Bürgerstaat,* though the control of the state fell by default to the military command.[16]

These remarks are not intended to whitewash German blunders leading to that struggle. Nor is it being denied that Imperial Germany, Victorian England, and other pre-democratic, constitutional states accepted social and sexual inequalities that are quite unsupportable in a democratic age. Though legal equality was part of their constitutional thinking, the state was not seen as a tool to equalize the condition of its citizens. The point, in any case, is that democratic nations, once mobilized, behave more intolerantly than even defective German liberals or Junker caretaker governments. Democratically elected leaders, as conscious bearers of a democratic mandate, have invoked popular sovereignty in waging global crusades and in implementing vast social change. And democratic bureaucracies, which Wilson extolled as instruments of "public service," have claimed effectively to represent the "general will."

The American social-cultural critic Irving Babbitt was properly struck by the Rousseauistic roots of Woodrow Wilson's American national state. Commenting on Wilson's "democratic imperialism," Babbitt viewed it as an example of the politics of romantic imagination, the will to power

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disguised as humanitarian expansiveness and democratic reform.[17] It may be argued, however, that the overshadowing theme in Wilson's writings and career from the 1880s on is the identification of the general will with bureaucratic democracy. From his volume *The State* in 1887, through his expansion and empowerment of the federal civil service during his first Presidential term, and down to his wartime control of public opinion and the economy, Wilson pursued relentlessly the same political vision: a state that knows what all the people should want and proceeds to impose it.[18] It thereby solves the quandary posed by Rousseau in *The Social Contract*, a public desiring the Good that it cannot properly see: "les particuliers veulent le bien qu'ils rejettent; le public veut le bien qu'il ne voit pas. Tous ont également besoin de guides. Il faut obliger les uns à conformer leurs volontés à leur raison; il faut apprendre à l'autre à connaître ce qu'il veut." Whence the need for the legislator as the plebiscitary interpreter of the "general will."[19]

The social thinker Robert Nisbet sees as another characteristic of modern democratic nationhood since Wilson's Presidency public mobilization for either war or its "moral equivalent." The public, says Nisbet, must be repeatedly made aware of its democratic mission at home and abroad lest individuals become insufficiently political or excessively private. Wilson's crusade for democracy in World War I led into other governmentally orchestrated campaigns for enhancing public virtue (for example, temperance), perfecting democratic equality (civil rights and feminist revolutions), and remaking the world (those measures undertaken to spread American democracy abroad). The result, Nisbet argues, has been a war against all spheres of life that are resistant to politicization. Even more ominously, the line of separation between public and private has steadily eroded so that embattled special interests have invaded the state while government bureaucrats interfere in formerly private educational, religious, and social institutions.[20]

A final observation may be in order about the descent of democratic nationhood. An overriding concern of America's Founding Fathers was the creation and preservation of countervailing branches of government. In *Federalist* 47, tyranny is defined as "the accumulation of all powers, legislative, executive, judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective."[21] This definition of tyranny betrays the classical liberal rudiments of American

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republicanism; and not surprisingly, Carl Schmitt mocked America as a mere society whose founders had insufficient regard for the principle of undivided sovereignty. Without such sovereignty, Schmitt (quoting Thomas Hobbes) contends, the executive cannot protect its subjects from outside violence or internal disorder. Whether Schmitt is right or wrong on this point, America has moved toward concentration of power in the hands of the few, but not for Hobbesian reasons. The growth of the American administrative state has not occurred as a protective response to violence or the threat of it. It has developed as a democratizing instrument, overlapping and engulfing all branches of government. As Benjamin Ginsburg and Theodor Lowi observe, moreover, this bureaucratic entity rules before, after, and during elections and establishes policies for politicians who come and go, unlike itself.[22] Nisbet considers this administrative state as the sine qua non of modern democratic nationhood. Resting on implicit consent and committed to an egalitarian ethos, it mobilizes the increasingly isolated members of a dissolving civil society for public sacrifice and civic activity. But Nisbet wrongly compares it to Hobbes's Leviathan. Though this regime views itself as a "mortal god" and tolerates no power but its own, it is neither capable nor willing to stop the war of all against all. If America's soaring and largely unpunished violence is any indication, the democratic nation state in its most recent therapeutic manifestation may actually be returning us to the most fearful state of nature.

Notes

1. For expressions of support for this democratic mission, see Charles Krauthammer, "Is History History?" and "The Conservative Crackup," *Washington Post,* August 15 and 22, 1989; Ben Wattenberg, "Heading Back Toward Isolation," *Washington Times,* September 29, 1989. On any weekday, the *Washington Times* Commentary section is likely to run at least one column presenting this point of view.
2. Leszek Kolakowski, "Dangers to Democracy," *Society* 27, no. 4 (May and June 1990): 77.
3. Max Weber, *Politik als Beruf* (eighth edition, Berlin: Duncker & Humblot, 1987), pp. 36–38.
4. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty,* translated and introduced by George Schwab (Cambridge, Mass.: MIT Press, 1988), pp. 46–49.
5. Schmitt, "Der Gegensatz von Parlamentarismus und moderner Massendemokratie," in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles* (Berlin: Duncker & Humblot, 1940), pp. 127–32.

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6. Michael Novak, *The Spirit of Democratic Capitalism* (New York: Simon and Schuster: 1982), pp. 111–12, 253. Though Novak criticizes socialism per se, he defends "social welfare programs" as integral to democratic capitalism. He finds nothing contradictory in the phrase "social welfare democratic capitalism."
7. *Money, Method, and the Market Process: Essays by Ludwig von Mises,* selected by Margit von Mises and edited by Richard M. Ebeling (Norwell, Mass.: Kluwer, 1990), p. 263.
8. John Lukacs, "The Stirrings of History," *Harper's,* August 1990, p. 48.
9. F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), pp. 248, 148, and 489.
10. The attempt to treat democracy as a docile but necessary hand servant of liberal legality is already present in Hayek's "Entstehung und Verfall des Rechtsstaatsideales," in Albert Hunold, ed., *Wirtschaft ohne Wunder* (Zurich, 1953), pp. 33–46.
11. Guido de Ruggiero, in *The History of European Liberalism,* translated R.C. Colingwood (Boston: Beacon Press, 1959), particularly pp. 93–157, offers the view of historical liberalism presented above, though with more emphasis on its individualistic component.
12. See, for example, Fritz Stern's *Dreams and Decisions* (New York: Knopf, 1988), and Hajo Holborn's introduction to Fritz Fischer's *Germany's Aims in the First World War* (New York: Norton, 1967).
13. For a revisionist portrait of German middle-class liberals, see Paul Gottfried, "History or Hysteria," *The Alternative: An American Spectator,* January 1975, pp. 16–18.
14. Alfred Cobban, *The Nation State and National Self-Determination* (New York: Thomas Y. Crowell, 1970), pp. 41–46.
15. Even Fritz Fischer, in his often savage denunciation of Germany's quest for world power before and during World War I, demonstrates that the German imperial government treated socialist critics with remarkable tolerance. See *Germany's Aim in World War One,* pp. 388–90 and 506. For the American wartime record of intolerance, see David M. Kennedy, *Over Here: The First World War and American Society* (New York: Oxford University Press, 1980); and on France's treatment of political "defeatists" and those favoring a negotiated peace, see Leslie Derfler, *The Third Republic 1870-1940* (Princeton: Van Nostrand, 1966), pp. 67–69.
16. Carl Schmitt, *Staatsgefüge und Zusammenbruch des Zweiten Reiches: der Sieg des Bürgers über den Soldaten* (Hamburg: Hanseatische Verlagsanstalt, 1934).
17. Irving Babbitt, *Democracy and Leadership* (New York and Boston: Houghton Mifflin, 1924), pp. 239–317.
18. For two extensive critiques of Wilson as a social collectivist, see Murray N. Rothbard, "World War I as Fulfillment: Power and the Intellectuals," *Journal of Libertarian Studies* 9, no. 1 (Winter 1989): 81–125; and Paul Gottfried, "Wilsonianism: The Legacy that Won't Die," *ibid.* 9, vol. 2 (Fall 1990): 117-26. For an examination of Wilson's "revolutionary rhetoric," see Paul Eidelberg, *A Discourse on Statesmanship* (Urbana, Ill., Chicago, and London: University of Illinois Press, 1974), pp. 312–62.
19. Jean-Jacques Rousseau, *Du Contrat Social* (Paris: Flammarion, 1966), p. 76.
20. Robert A. Nisbet, *The Present Age* (New York: Harper & Row, 1988), pp. 20–40 and 61–63.

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21. *The Federalist Papers*, introduction by Clinton Rossiter (New York: Mentor, 1961), p. 303.
22. See Benjamin Ginsberg, *The Consequences of Consent: Elections, Citizen Control, and Popular Acquiescence* (New York: Random House, 1982), pp. 27–59; and Benjamin Ginsberg and Theodore J. Lowi, *American Government: Freedom and Power* (New York: Norton, 1989).

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Introduction to the French Edition of *Ethics of Liberty*

by Murray N. Rothbard*

Perhaps the best way of writing an introduction for this most welcome French translation of *Ethics of Liberty* is to discuss what has happened to libertarianism since the book's original publication in 1982. Any such history can be divided into first, the development of libertarian theory, and second, its spread throughout the opinions and views of men and from there into human institutions.

No such history can ignore the most dazzling and even wondrous event of the twentieth century: the revolutionary collapse and "implosion" of socialism/Communism in the Soviet Union and Eastern Europe. The Revolution of 1989–90 is indeed a "revolutionary moment" in history. Generally, social and political institutions seem to be in stasis, with changes occurring only in gradual, nearly invisible micro-steps. But then, just as any hope (or fear) of revolution comes to seem impossibly romantic and utopian, Bam! the revolution appears. One of the features of such revolutions is that history's timetable suddenly accelerates with blinding speed, so that changes occur which would have seemed an impossible dream only months earlier. The roles of individual historical actors shift rapidly, as in the case of the French Revolution; an advanced revolutionary, by merely standing still, becomes a stubborn reactionary a few months later. Thus in the Revolution of 1989–90 we see Gorbachev, not long ago at the spearhead of revolutionary change, now struggling to keep up with the accelerated flight to privatization and a free-market economy.

The Revolution has spectacularly confirmed the libertarian view I have been expounding for many years: long-run optimism. My position posed

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a stark contrast to that of the conservative movement, which, from 1945 until last year, based its bellicose anti-Communist foreign policy on the crucial and bleak assumption that once a country goes Communist, it disappears, irreversibly, into a black hole of history. But the Revolution of 1989 demonstrates conclusively that Orwell was wrong—that the boot will not be stamping on the human face forever, that the spirit of freedom burns so strongly in the human breast that no brainwashing, however totalitarian, can stamp it out.

The corollary error made by the conservatives was their failure to absorb the great and prophetic lesson first propounded in 1920 by Ludwig von Mises: Socialism, no matter how benign or how knowledgeable the Planning Board may be, cannot calculate—because socialism, by its very nature, is deprived of the means to calculate costs and returns, or profits and losses, by the absence of private property, and hence a genuine market, in the means of production (including the critically important market in titles of ownership of these assets; i.e., a stock market). Mises warned that socialism, in attempting to run anything resembling a modern economy, is literally *impossible*—a word for which he was scorned for decades but that has now proven dramatically to be correct. Significantly, the veteran Marxist economist Robert Heilbroner has recently thrown in the towel: "It turns out, of course, that Mises was right."[1]

Indeed, one of the most astonishing and heartwarming aspects of the East European Revolution is that the cry of the revolutionaries is not only for free speech and democracy, and not merely for reform; but for a total overthrow of socialism, and for a radical, rapid, "shock treatment" move to private property, stock markets, hard currencies, and freedom of markets and of enterprise. This is true not only in Poland and the Baltic states, but in particular in the Russian Republic, where Boris Yeltsin's cabinet consists of young, able, and dedicated advocates of the free market and of private property.

A final error of conservatism has also been revealed by these striking events: the bitter hostility to radical change and to revolution per se, fueled by the mixed results of the French Revolution and the disaster of the Communist revolutions of the twentieth century. In any move in the direction of freedom, radical change may indeed be superior to the much-lauded merits of gradualism, "phasing-in", and all the rest of the apologias for doing little or nothing. Despite the obvious turmoil entailed by radical change,

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it is still better to eliminate a chronically ill system of repression, statism, and organized crime earlier rather than later. It is better to *écraser l'infame* than to allow it to linger and cripple freedom and prosperity.

One truly astounding aspect of the 1989 Revolution is that it has been achieved with almost no use of violence against the Communist ruling elite. I myself never believed that non-violence could work as a revolutionary instrument except in cases where the populace was fueled by a common and intense religious drive: Gandhi in India, or the Shiite revolution of 1979 in Iran (which, before it came to power, was almost wholly non-violent). The Marxists have always explained that all revolutions in history are brought about by a loss of the will to power—for one reason or another—by substantial portions of the ruling class. Clearly, the way was paved for 1989 by a truly universal and total loss of faith in the Communist state and in Marxist-Leninist ideology. As the system increasingly failed to work, even on its own terms of constructing and planning a modern socialist commonwealth, belief in the ideology and in the system faded away, until growing economic crisis led everyone—from the ruling elite on down—to scrap the system. It was like pushing on an open door once each person, group, and country suddenly realized that *every other* person and group had also lost faith in the system.

If libertarian ideas, and, we hope, institutions, are suddenly flourishing in the old "socialist bloc," then what is their status in the West, the "victors" in the Cold War? Here, the situation is not so bright. With the collapse of the socialist bloc, *no one* in the U.S., regardless of where he is on the ideological spectrum, talks of "socialism" or "central planning" anymore, and everyone pays some lip service to the importance of "the market." But unfortunately, while old-fashioned socialism and central planning are dead, the same cannot be said of statism and interventionism. On the contrary, interventionism is flourishing as never before. The idea now is to preserve the shell of the market, but to cripple it increasingly on behalf of a plethora of interventionist goals.

The new interventionist menace is not so much in the narrowly economic areas, although even here there are increasing calls for "reregulation" of parts of the market economy. The disastrous collapse of the savings and loan industry, which will entail a taxpayer bailout of several hundred billion dollars (the estimates increase virtually every month), is routinely blamed on "deregulation" and the "Reagan climate of greed," when the

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true culprit has been the entire system of government deposit insurance which has served as an indispensable prop to the inherently insolvent system of fractional reserve banking. And the general ignorance of finance has enabled an alliance of statist demagogues and an angry corporate establishment to unite and convict the financier Michael Milken and other traders and bankers of the alleged crime of "insider trading" (that is, benefiting from knowing more than others about the market, which is an attribute of all successful entrepreneurship), and to punish them with enormously heavy fines as well as jail sentences. Their *real* crime was to provide financing of takeover bids by entrepreneurs who offered to rescue corporate stockholders from the actions of inefficient managers who happened to be members of the Old Guard-corporate establishment.

But the true interventionist menace nowadays comes not from directly economic arguments but from "social" leftists who talk "morality" rather than economics, although their measures would generate increasingly dire economic consequences. Unfortunately, though, the free-market economists who have proliferated in the last decade in universities, think tanks, and the federal government, have—in the fashion of almost all economists since Ricardo—used exclusively economic and utilitarian arguments. For many decades, either as utilitarians or as positivists, free-market economists have avoided moral arguments (a) in the mistaken reason that science must be value free, and that therefore they as scientists cannot engage in ethical discourse, and (b) because, believing that moral arguments are "irrational" or non-rational, they maintain that moral arguments cannot convince anyone. And yet, it should be clear to any unbiased observer that moral arguments are employed a great deal, and that they often convince people, utilitarian or positivist arguments notwithstanding. But not only that: Convincing someone on utilitarian grounds is apt to be met with a shrug—OK, you're right—and then the listener or reader walks away to tend to his own concerns. But let someone be convinced of your cause by a moral argument and he or she will be a militant and dedicated partisan for life.

A large part of *Ethics of Liberty* is devoted to an argument on behalf of a doctrine of liberty grounded in ethics and in property rights. I contend that no advocacy of public policy, however seemingly "scientific," can be value free; none can escape taking an ethical position. Far better, then, to frame one's ethics clearly and consciously, instead of smuggling them in, ad hoc and unanalyzed, as implicit assumptions of one's analysis.

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Since free-market advocates have abandoned the arena of ethics, they have disastrously allowed the new breed of leftists and statists to occupy the high moral ground, and to issue moral pronouncements unchecked by libertarian or conservative opposition. To interventionist proposals, however outlandish, conservatives and free-market opponents can only point feebly to the enormous economic cost of the policies. But having abandoned the high moral ground, the opposition can only fight a losing, rear-guard action. Statists get their proposals adopted, compromising in the beginning on cost, and then over the years continually widening and accelerating the programs, driving up costs over a longer period. Similarly, in the late nineteenth century, classical liberals and free-market capitalists conceded to the burgeoning socialists the high moral ground: They acknowledged that socialism was a wonderful moral "theory," but that it could not really work "in practice." It was only left to the socialists to say: "Give us a chance—give us a country—and we will see if what you admit is an ideal theory will indeed work in practice." As late as the 1930s, Soviet Communism was called, by fellow travellers in the West, "the great social experiment." It took eighty years of catastrophe to bury that "experiment," to pronounce it a failure, and to try to dig out of the remaining rubble.

To be specific, there are three areas in which Left-statism has, in the U.S. at least, grabbed the high moral ground and is making startling inroads, virtually without opposition from intellectuals or the opinion-molding classes. By successfully stigmatizing any opposition as bigoted, narrow, selfish, "insensitive," and ignorant, the statists have been able to confine any opposition to marginal pockets of the decidedly non-respectable: to groups often stigmatized in the U.S. as "rednecks." The three burgeoning areas of statist menace are as follows.

First, there is what might be called "group egalitarianism." In an ideology of what the writer Joseph Sobran has called "accredited victimology," certain groups are singled out as Accredited or Official Victims. These groups, ever-expanding in number, are designated as victims of other Victimizer groups. It then becomes the duty of the state to shower wealth, jobs, status, and innumerable privileges upon the Victims at the expense of the alleged Victimizers. This is a grotesque form of compensation or reparations, since (a) the Victimizers have done no individual harm to anyone, while the Victims have not been individually harmed by them.

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They receive privileges or burdens merely because similar groups may have been Victims or Victimizers in the past—sometimes a long and distant past. Moreover (b) there is no designated terminal date to these reparations, which apparently are supposed to go on forever without end, or at least until the Victim groups are pronounced to be "equal" in every way to the Victimizers. Since the pronouncing is to be done by the statist "new ruling class" engaged in the system of massive redistribution (with themselves, of course, receiving a healthy cut as a "handling fee"), this announcement of final victory will clearly never take place.

The expanding set of Accredited Victims now includes blacks, Jews, Asians, women, the young, the elderly, the "homeless," homosexuals, and—the latest category—"the handicapped," which leaves as the core Victimizers middle-aged white male heterosexual non-handicapped Christians residing in homes.

The second statist threat is, I am sure, all too familiar to my French readers: the bundle that comes under the rubric of "the environment." When *Ethics of Liberty* was published in 1982, the major concerns were air and water pollution, and myself and other free-market economists have been demonstrating that pollution arises from the long-standing failure of government courts to define and protect property rights, and that the problem could be solved by demarcating strict property rights in air and water.[2] Since then, however, it has become increasingly clear that the environmentalists have no interest in private-property solutions to pollution, to saving various obscure animal species, or to anything else. The environmentalists are driven by a literally anti-human ideology, akin to pagan or pantheist religions, which holds man as the lowest and most despicable entity in nature. All entities in the world—animals, plants, insects, trees, and even beaches and rocks—have "rights" superior to that of mankind. The basic view is that before man, all animals, plants, rocks, etc. were "in ecological balance"; the world proceeded in peaceful, harmonious stasis, in the metaphor of unchanging circles. But then, along came man, the despoiler. Unlike other creatures or entities in nature, man was not limited or determined by his environment. In sinister fashion, man dared to *change* and transform his environment, disturbing the peaceful circles of the ages, and engaging in growth and progress—in the metaphor of a straight line. Thereby the "ecology," the environment, was tragically, even irreversibly, altered and put out of kilter. The goal of the environmentalists is to set the world aright by reducing it to a pre-man state, or as

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close to it as they can get; in short, to cripple and even put an end to production and consumption, let alone growth and development. All environmentalism is grounded in this truly evil and anti-human doctrine, but this view is made explicit in the works of the "deep ecologists," such as the Norwegian philosopher Arne Naess and the Earth First! organization in the U.S.

All in the succession of pseudo-scientific hysterias that have hit the world in recent years—global warming (successor to the "new ice age"); disappearance of resources; acid rain; the hole in the ozone; the alleged "energy crisis"; the wailing about old forests, the caribou, and the spotted owl; the reliance by the media on a few publicity-hungry leftist scientists while ignoring the great majority of cautious, genuine ones—all of these are simply weapons in the environmentalist war against human production and consumption, and especially against bourgeois comforts that particularly madden the environmentalists, like large, "gas-guzzling" automobiles, fur coats, air conditioning, plastic containers, disposable diapers, and aerosol cans for hair spray and deodorants.

Since any genuine morality must be based on the happiness and flourishing of mankind, it is particularly galling to see the profoundly anti-human environmentalists able to seize the high moral ground uncontested.

The final element of this unholy triad is a burgeoning new brand of Left Puritanism. As in the old-fashioned brand of Puritanism, the new variety tries to stamp out human enjoyment; the difference is that the current variety is far broader than the older concentration on sex. Now any forms of enjoyment that might, to any degree, be risky for one's health, must go under the interdict. The aim of the New Puritanism seems to be to outlaw all activities that are not certifiably good for you, or which incur any degree of risk whatever. Hence the current hysteria against the smoking of tobacco in the U.S., promoted by leftist busybodies in a broad range of repression, from social obloquy to institutional and legal rules and prohibitions. Laws against smoking in public are now rampant, as well as laws against the advertising of cigarettes on radio or television. Prohibition of liquor is back again, in the form of outlawing the sale of liquor to anyone under the age of twenty-one, or of driving automobiles while under the influence of alcohol. The hysterical criminalization of drugs in the U.S. is well known, and the U.S. has induced or coerced most other nations to go along with this clearly futile and counter-productive crusade.

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In the meanwhile, all sorts of food additives are being outlawed because massive doses over many years have induced cancer in a few rats. The large-scale social and governmental propaganda against risk and in favor of "fitness" makes it clear that the current New Puritan ideal is a man or a woman who eats only certifiably healthy (and therefore tasteless) food and spends all of his or her time "working out" on exercise machines (preferably indoors, because anything that man does outdoors is held to be "desecrating the environment"). But this totally fit man would not be able to produce or consume very much, because of the "desecration" inherent in his activities.

Left Puritanism also fits in with Accredited Victimology, since there are increasing social and even legal bans on scientific research, or on any expressions of opinion that may be decreed as hurting the feelings, or displaying "insensitivity," toward the aforesaid Victim groups. This prohibition explicitly includes expressions of wit and humor. As a result of these pressures, speech and press in the U.S. have become noticeably less free and candid and noticeably more earnest, solemn, and boring, as everyone scrambles to stifle expressions of opinion that do not fit in with the new orthodoxy. The only hard-hitting or witty speech or writing now socially permissible in the U.S. is that directed against the white male Christian, the Victimizer. *Then,* such speech is considered a justifiable expression of frustration or centuries-old rage against the Victimizers. But any expression of rage, or indeed, of candor or wit, against Accredited Victims has been read out of the respectable media. Indeed, any such expressions on college campuses are now literally grounds for expulsion—which now, at least at the University of Connecticut, include the crime of "inappropriately directed laughter." If not expelled, these student felons are consigned to "re-education classes," a grisly and perhaps unwitting echo of the old Soviet "rehabilitation centers."

Fortunately, I am confident that France will not fall victim to Left Puritanism; at least I cannot visualize Frenchmen giving up cigarettes and wine in the quest for cardiovascular perfection.

Let us now move from the world of institutions and opinion to that of theory. There has been, since 1982, a gratifying expansion of interest in libertarianism among economists and philosophers. The Austrian school of economics has flourished greatly since 1982, especially with the establishment and increasing success of the Ludwig von Mises Institute, centered

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at Auburn University, with its numerous books and conferences and its *Review of Austrian Economics.* In Great Britain, in contrast to the U.S., both Austrian economics and libertarian political theory have achieved respectability in their various disciplines, so that neutral textbooks are starting to treat them objectively and routinely as one of several important schools of thought in the discipline. Unfortunately, neither Austrianism nor libertarianism, though growing, has yet achieved this critical status in the U.S., perhaps because the orthodoxy here is more entrenched, or more vituperative.

Free-market economists, as noted above, have remained mired in the pose of value freedom, but some, like Nobel Laureate James Buchanan, have been moving cautiously into a form of contractarianism, which seemingly allows them to maintain a form of value freedom while simply endorsing the voluntary contracts of others. Unfortunately, in the case of Buchanan and others, the contractarianism has taken the cynical and utilitarian Hobbesian form rather than the property rights–establishing form of John Locke. Otherwise, in Britain, the European continent, and the U.S., social philosophizing among free-market advocates has largely taken the murky path of F.A. Hayek, with consequent vague blather about "evolved rules" and traditions. Hayek is a dramatic example of someone who wants to ground the free market in something beyond mere utilitarianism, yet believes neither in the possibility of a rational ethic nor in divine revelation; hence his decades-long and unsatisfactory quest for a substitute, which in *The Constitution of Liberty* was general and uniform rules for their own sake, regardless of the content of such rules. In later Hayekian thought, this ideal became transmuted into the ratification of any and all evolved rules, amounting to the ultra-traditionalist position that "anything that has lasted a long time is good." And not only good: Since Hayek believes that human reason is helpless to arrive at ethical or political rules, or, indeed, much of anything else, these evolved rules must be obeyed implicitly and without cavil. That this solution is unsatisfactory as well as anti-libertarian should be evident; for, after all, systematic murder and theft have existed for innumerable centuries; and since they then can be said to have "successfully evolved," how can anyone say that they should be reduced, much less eliminated?

In the philosophy profession in the U.S., Robert Nozick's *Anarchy, State and Utopia* of 1974 exerted a liberating effect on the discipline, since its

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wide success in academia, greatly bolstered by his status at Harvard University, made the discussion of rights, liberty, and corollary problems intellectually fashionable for the first time in decades. Nozick thus helped make a decisive break with the previous positivist-analytic tradition dominant in the U.S., which had read the very treatment of such topics out of philosophy as "meaningless," and consigned them contemptuously to the departments of literature or religion. Philosophers could now write term papers, doctoral dissertations, or journal articles on such topics without being laughed out of the profession.

The *content* of Nozick's book, however, provided no great breakthrough for libertarian theory. In addition to his unsound and self-contradictory justification of the minimal state, Nozick simply assumed "rights" without any grounding, and instead of developing or applying libertarian rights systematically, went off on various tangents, puzzles and asides which reflect the weaknesses as well as the strengths of Nozick's mind-set: namely, to become fascinated with his own virtuoso displays of technical razzle-dazzle, rather than with a search for coherent and systematic truth.

While Nozick's style was well-suited to success in the philosophy profession, *Anarchy, State and Utopia,* paradoxically, left no lasting mark in his field. One important reason is that despite the fact that comments on or refutations of Nozick's work filled the philosophy and political theory journals for several years, he did not deign to reply to any of the critics or commentators. In addition to angering many philosophers, this systematic silence meant that Nozickian theories could not take on any sort of lasting life in the profession; nor, in the absence of such continuing dialogue or argumentation, was Nozick able to develop followers or disciples.

The reason for Nozick's silence is evident to anyone who has followed his career: After writing a book, Nozick moves on to radically different interests, with little or no continuity between them. In the same way, he each year teaches completely new and different courses, so that it is impossible for him to attract student followers or generate a school of thought.

Finally, in his latest work *The Examined Life,* Nozick explicitly abandons libertarianism in a book filled with vague and hortatory (yet also technical) neo-Buddhist musings about the meaning of life. The book has justifiably drawn widespread ridicule in and out of the philosophy profession. Characteristically, Nozick shifts radically from libertarianism to

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advocating a welfare state and coerced morality, without bothering to explain his shift, to justify or expound his new position, or to give a critical refutation of his own previous viewpoint. In view of the content of *Anarchy, State, and Utopia,* however, as well as his record since, I do not consider Nozick's defection from libertarianism a very great loss.

In the meanwhile, though, partly as a result of the door that Nozick originally opened, there has been a proliferation of libertarian philosophers in recent years. David Gauthier, Jan Narveson, Loren Lomasky, Henry Veatch, Eric Mack, Douglas Den Uyl, Douglas Rasmussen, the prolific Tibor Machan, and the prominent jurist Richard Epstein, have written extensively on behalf of a rights-based libertarianism. Unfortunately, Gauthier and Narveson are contractarians; Lomasky is a believer in "welfare rights" and therefore scarcely qualifies as a libertarian; and Veatch is a distinguished advocate of rights but is merely sympathetic to, rather than an adherent of, libertarianism. Epstein, in the end, waffles on rights and plumps for a utilitarian muddle. Mack, Den Uyl, Rasmussen, and Machan are neo-Randians who, like myself, are Aristotelians in basic philosophy and Lockeans on rights. Unfortunately, all of them still cleave to the minimal state.

These works and numerous others offer significant contributions to the libertarian literature. My complaint, however, is that all of these writers spend their time trying to establish the groundwork for rights: utilitarian, contractarian, Lockean, or whatever. This is a fascinating and highly important field, but I can't help believing that in the common manner of philosophers, too much time has been spent arguing over the foundations without at all developing the concrete applications: What is, or should be, every person's property right, and what may be considered a tort or crime against such rights? This is precisely the major area of concern of *Ethics of Liberty.* In a libertarian society, who owns what and how is such ownership to be decided? What are the implications of self-ownership, or of the homesteading of property rights from the use of previously unowned natural resources? And what are the implications of these property rights for the scope and even the very existence of the state itself? I am sorry to say that none of the above writers even attempt to pursue or answer such questions. Hence, no one has continued in the path of such political theorists as Locke and Herbert Spencer.

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Clearly, despite the burgeoning of libertarian volumes in the past decade, much work remains to be done in developing and applying libertarian theory. And far more needs to be done, of course, in spreading libertarian opinion, and embodying these ideas in institutions throughout the globe.

Notes

1. Robert Heilbroner, "After Communism," *The New Yorker,* Sept. 10, 1990, p. 92.
2. My article "Law, Property Rights, and Air Pollution," *Cato Journal* 2 (Spring 1982): 55–99, reprinted in Walter Block, ed., *Economics and the Environment* (Vancouver: Fraser Institute, 1990), not only discusses the problem but extends the argument of my book by trying to work out a systematic legal framework for deciding upon and enforcing property rights.

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The Cultural Thought of Ludwig von Mises

by Jeffrey A. Tucker and
Llewellyn H. Rockwell, Jr.*

Ludwig von Mises (1881-1973), heir to the Austrian tradition founded by Carl Menger and developed by Eugen von Böhm-Bawerk, was the preeminent economic thinker of his age. His best-known insights include the impossibility of economic calculation under socialism, the monetary origins of the business cycle, and an elucidation and defense of the use of deductive reasoning in the social sciences (see, for example, Rothbard, 1983).

In matters of public policy, Mises was an unabashed supporter of the free market, hard money, and the rule of law. During his life in the U.S. (to which he emigrated in 1940), he was considered a member of the conservative movement (see, for example, Nash, 1976; East, 1986; and Filler, 1987), and he wrote frequently for such conservative publications as *American Opinion, Christian Economics, Intercollegiate Review, Modern Age,* and *National Review.* But Mises's political conservatism must be qualified. Rothbard (1981) has shown that Mises was a "laissez-faire radical" who supported national self-determination and the right to secession (even for small groups), the French Revolution, and free immigration, and opposed

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war and militarism—positions not characteristic of conservatism. Mises's political radicalism, however, did not imply any sympathy for moral libertinism (the view that human behavior ought not be restrained by formal or informal codes of manners and morals) or cultural relativism (the view that all civilizations should be regarded as equally valid). Instead, the positions Mises held on various cultural questions are characteristic of modern American traditionalist conservatism.[1]

This paper seeks to present Mises's views on cultural questions as well as his belief that certain cultural institutions are buttressed by a laissez-faire social order. It also seeks to show that Mises was an opponent not only of the political agenda of the Left, but of its cultural agenda as well, which he saw as inconsistent with and indeed hostile to a laissez-faire social order.

The socialists had more than political economy in mind; they also wanted a revolution in social institutions, morals, arts, manners, and relations between the sexes and the races. The socialists understood that politics and economics are inextricably linked to culture. No advocate of a particular political-economic order can overlook this, and Mises did not. Mises believed that feminism was an assertion of equality, a revolt against nature, and therefore akin to socialism; that the family and marital fidelity were essential to civilization; that it was possible to make broad generalizations and perhaps scientific statements about races and ethnic groups; that apparent racial inequalities ought to be studied, although not used to influence state policy; that "Eurocentrism" was the proper outlook; and that one need not be sympathetic to mass culture or the counterculture, as Mises emphatically was not, to support the free market. So conservative was Mises on cultural issues, in fact, that today he would be regarded as a reactionary.[2]

I. Equality versus Inequality

The central theme in Mises's cultural traditionalism was the fact of human inequality. He therefore opposed all forms of egalitarianism. "The fact that men are born unequal in regard to physical and mental capabilities cannot be argued away," he wrote. "Some surpass their fellow men in health and vigor, in brain and aptitudes, in energy and resolution and are therefore better fitted for the pursuit of earthly affairs than the rest of mankind" (Mises, 1961, pp. 190–91). In holding this view Mises stood apart, as he so often did, from the social science establishment of his day. He cites the *Encyclopaedia of the Social Sciences* (1930) claim that "at birth human infants, regardless of their heredity, are as equal as Fords."

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The market makes society's existence possible, primarily because it is the only means of social cooperation that takes into account the inherent inequality of men. If every man were identical to every other (and therefore all non-human resources would be equally available to all), there would be no question of capital formation, the division of labor, or capitalism. In fact, if the assertion of equality were true, there would be no economic or social problem to discuss. Thus when Mises seeks to support the classical economists' idea of the division of labor, the "innate inequality of men" is the first reason he invokes. The market, through the law of association, provides the means for all men to cooperate under the social division of labor, allowing all people to pursue the tasks most in keeping with their individual talents, strengths, and dispositions, whether the tasks they perform are considered mundane or extraordinary (Mises, 1966, pp. 157–166).

The state cannot know, apart from information generated by the market, which task is better suited to which individual. Because of the constraints that nature has placed on everyone, in varying degrees, it is futile for the state to attempt to eradicate inequalities. To do so will necessarily make social conditions worse.[3]

Mises believed in the doctrine of equality before the law, but opposed the attempt to derive it from the alleged equality of all men: "[O]nly deadly foes of individual liberty and self-determination" do so (Mises, 1961, p. 190). Rather, he held that equality before the law, more than any other system, promotes social cooperation and prosperity. If equality is made a social goal, then individuals must be treated unequally by the law. Equality and the rule of law are incompatible (Mises, 1966, pp. 840–842). Neither should democracy, nor "representative democracy," be justified on grounds of equality; to do so is "faulty and untenable" (Mises, 1961, p. 196). Those who argue for the "intellectual and moral eminence of the masses," or that "the voice of the people is the voice of God," are most often attempting to "substitute despotism for representative government" (p. 197). For Mises, democracy has only one justification: peaceful succession in government. Majority rule is not "a metaphysical principle . . ." (p. 197).[4]

Thus Mises stood in dramatic opposition to the political and cultural egalitarianism that has long been the operating principle of the modern state (see, for example, Mora, 1987, and Schoeck, 1966).

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II. Sex, Family, and Feminism

A poignant illustration of Mises's anti-egalitarianism can be found in his writings on sexuality, the family, free love, and feminism. Though Mises did not derive his views from a deference to tradition, he reasoned that traditional rules and institutions clearly flow from the natural interaction of men and women in freedom, and that these rules and institutions are formed by the biological necessity of the sexual division of labor in combination with the law of contract, which had such civilizing effect on sexual relations.

A. *The Sexual Instinct*

In *Socialism: An Economic and Sociological Analysis* (1922), Mises sought to refute the arguments of those who would overthrow the "natural order" of capitalism for unnatural collectivism. In doing so, he attacked the entire agenda of the socialists, which he saw as internally consistent, yet consistently destructive. Thus Mises observed, "proposals to transform the relations between the sexes have long gone hand in hand with plans for the socialization of the means of production." "Marriage is to disappear along with private property. . . . When man is liberated from the yoke of economic labor, love is to be liberated from all the economic trammels which have profaned it. Socialism promises not only welfare—wealth for all—but universal happiness in love as well" (p. 74).

Mises saw nothing degrading about sexual relations; he condemned the view that sex should be seen as a necessary evil. To Mises, sexual relations were bound up with a human inclination toward sensuality. To achieve its highest expression, however, sensuality must be brought under the discipline that only humans, and not animals, have the capacity to achieve (p. 88). In fact, the process of becoming a man is ultimately linked with the struggle for sexual discipline and fidelity in monogamous family life. "There is a process which every individual must pass through in his own life if his sexual energies are to cast off the diffuse form they have in childhood and take their final mature shape," Mises wrote. "He must develop the inner psychic strength which impedes the flow of undifferentiated sexual energy and like a dam alters its direction" (p. 74). Citing Freud, he said that the necessity for undertaking the process of controlling "sexual energy" is a difficult one, and that "not everyone escapes

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unscathed from the stress and struggle of this change. Many succumb, many become neurotic or insane.''

In this struggle to rein in sexual urges, most men overcome their instincts and learn to control their sexual energy, an essential component of a peaceful and fulfilled life. In doing so, some men ''turn to religion, others to philosophy, and still others become satisfied with everyday life'' (p. 84). Yet one group never adjusts: ''men who do not know where or how to find peace.'' ''At any price they want to win and hold happiness. With all their might they strain at the bars which imprison their instincts.'' With these men, marriages are often ''wrecked,'' not by the capitalist social order—as the socialists claimed—but by a ''disease'' that ''germinates not without, but within; it grows out of the natural disposition of the parties concerned.''

Mises held that the neurosis caused by the struggle for fidelity was exploited by socialists and Utopians to advance their political agenda. Moreover, ''this was the more to be expected since many of them were themselves neurotics suffering from an unhappy development of the sexual instinct'' (p. 75). Mises went so far as to offer a research program: Speaking of the socialist François Marie Charles Fourier (1772–1837), Mises observed that sexual ''disorder'' is ''evident in every line of his writings'': ''[I]t is a pity that nobody has undertaken to examine his life history by the psycho-analytic method'' (p. 75).

In discussing the role of sex, Mises drew a sharp distinction between men and women. ''It is clear,'' he writes, ''that sex is less important in the life of man than of woman. Satisfaction brings him relaxation and mental peace. But for the woman the burden of motherhood begins here. Her destiny is completely circumscribed by sex; in man's life it is but an incident. However fervently and wholeheartedly he loves, however much he takes upon himself for the woman's sake, he remains always above the sexual. Even women are finally contemptuous of the man who is utterly engrossed by sex. But woman must exhaust herself in love and as mother in the service of the sexual instinct. Man may often find it difficult, in the face of all the worries of his profession, to preserve his inner freedom and so to develop his individuality, but it will not be his sexual life which distracts him the most. For woman, however, sex is the greatest obstacle'' (p. 88).

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Mises saw the fate of whole civilizations hinging on their attitude towards relations between the sexes. The proper attitude establishes cooperation between the sexes, so that men are not "dragged by women" into the "low spheres of psychic bondage" (by being fixated on sexual urges and sensual satisfaction) and so that women may preserve the "freedom of inner life" (by entering sexual relations on consensual grounds). To arrive at this ideal is "part of the cultural problem of humanity." For example, the failure to achieve sexual cooperation "destroyed the Orient." "Every progressive movement which began with the development of personality was prematurely frustrated by the women, who dragged men down again into the miasma of the harem." Mises disagreed with those who held that the Orientals "understood the ultimate questions of existence more profoundly than all the philosophy of Europe." In fact, "they have never been able to free themselves in sexual matters" and that has "sealed the fate of their culture." Similarly, the Greeks erred, said Mises, by excluding the married woman from culture. The Greek man's "love was for the hetaera alone. Eventually he was not satisfied even here, and turned to homosexual love. Plato sees the love of boys transfigured by the spiritual union of the lovers. . . . To him the love of woman was merely gross sensual satisfaction" (p. 89). The temptation toward "gross sensual satisfaction" had to be overcome so that men and women could reach a civilized understanding of their respective sexual roles.

Prostitution contradicts this cooperative spirit. The socialists had long claimed that prostitution was a product of capitalism, with women driven to sell their bodies to exploitative men. Mises comments that "prostitution is an extremely ancient institution, unknown to hardly any people that has ever existed" (p. 92). It is a "remnant" of the precapitalistic age, "not a symptom of the decay of higher culture [Western capitalism]." It was the "ideal of capitalism" that contributed to producing the "demand for man's abstinence outside marriage" by insisting on "equal moral rights for man and woman." Thus capitalism, argues Mises, discourages prostitution. Here he applies his model that whatever is in accord with man's nature—such as sexual fidelity within marriage—is fostered by the only economic system, capitalism, that is also in accord with man's nature.

By equalizing all incomes and eliminating all avenues for gaining wealth, socialism might be able to remove the "economic temptation to prostitution" (p. 92), but that would not solve the problems associated with the

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sexual instinct. Instead, the socialist's complaints about disordered sex lives under capitalism would reach their fulfillment under socialism. "By returning to the principle of violence," and creating unbalanced conditions contrary to social cooperation, socialism "must finally demand promiscuity in sexual life" (p. 91).

B. *Marriage versus Free Love*

Mises viewed marriage as an inescapable social institution, part of "an adjustment of the individual to the social order by which a certain field of activity, with all its tasks and requirements is assigned to him" (Mises, 1922, p. 85). Marriage, said Mises, reins in the sexual instincts of man and allows woman to achieve what nature and biology tell us is her primary occupation, bearing children and caring for the family.

The socialists wage war against this. "Marxism indeed seeks to combat marriage just as it seeks to justify the abolition of private property" (p. 75). Marxists claim that marriage was never part of natural society, and capitalism created "every imaginable evil," including marriage and the domination of women by men (see, for example, Shafarevich, 1974).

In setting out to refute the Marxist version of history, Mises saw two historical phases in relations between the sexes: the age of violence and the age of capitalism. During the age of violence, "male aggressiveness, which is implicit in the very nature of sexual relations, is here carried to the extreme. The man seizes possession of the woman and holds this sexual object in the same sense in which he has other goods of the outer world. Here woman becomes completely a thing. She is stolen and bought; she is given away, sold away, and ordered away; in short, she is like a slave in the house" (Mises, 1922, p. 76). Moreover, "where the principle of violence dominates, polygamy is universal. Each man has as many wives as he can defend. Wives are a form of property, of which it is always better to have more than few" (p. 81).

This situation could not endure any more than socialism can endure. "[I]t is against nature that man should take woman as a will-less thing." Mises explains that the "sexual act is a mutual give-and-take, and a merely suffering attitude in the woman diminishes man's pleasure. To satisfy himself he must awaken her response." Once that is recognized, it is clear that "the victor who has dragged the slave into his marriage bed, the buyer

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who has traded the daughter from her father must court for that which the violation of the resisting woman cannot give. The man who outwardly appears the unlimited master of his woman is not so powerful in the house as he thinks; he must concede a part of his rule to the woman, even though he ashamedly conceals this from the world'' (p. 78).

The age of violence was also ''against nature'' because ''the characteristic of love, the overvaluation of the object, cannot exist when women occupy the position of contempt. . . . For under this system she is merely a slave, but it is the nature of love to conceive her as a queen.'' Under violence, the sex act will become ''an extraordinary psychic effort which succeeds only with the assistance of special stimuli. This becomes more and more so in proportion as the individual is compelled by the principle of violence'' and thus makes sexual intercourse more and more difficult (p. 78). The onset of capitalism, however, corrected this, by bringing relations between the sexes more into line with nature. Society began to see marital relations as a contract, which makes the ''wife a partner with equal rights. From a one-sided relationship resting on force, marriage thus becomes a mutual agreement. . . . Step by step she wins the position in the home which she holds today'' (p. 82).

All modern ideals of marriage grow out of contract: ''that marriage unites one man and one woman, that it can be entered into only with the free will of both parties, that it imposes a duty of mutual fidelity, that a man's violations of the marriage vows are to be judged no differently from a woman's, that the rights of husband and wife are essentially the same'' (p. 82). This change is reflected in the ancient and capitalist attitudes toward divorce. Under the ''modern law,'' no longer does a man have a ''right to cast off his wife which man once possessed.'' Mises notes that ''the Church takes the lead in the struggle against divorce,'' but says it should ''remember that the existence of the modern marriage ideal of monogamy—of husband and wife with equal rights—in the defense of which the Church wishes to intervene, is the result of capitalist, and not ecclesiastical, development'' (p. 83).

Mises also replied to the socialist and libertine claim that because some genuises have rejected marriage, the validity of the institution should be cast into doubt. It is true, he says, that ''genius does not allow itself to be hindered by any consideration for the comfort of its fellows—even those closest to it. The ties of marriage become intolerable bonds which the genius

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tries to cast off or at least to loosen so as to be able to move freely. . . . Rarely indeed is he granted the happiness of finding a woman willing and able to go with him on his solitary path'' (pp. 85–86). This was ''recognized long ago,'' says Mises. ''The masses had accepted it so completely that anyone who betrayed his wife felt himself entitled to justify his action in these terms.'' But the true genius ''is rare and a social institution does not become impossible merely because one or two exceptional men are unable to adjust themselves to it'' (p. 86).

Socialists also used the unhappiness of some marriages to question the institution itself. Mises agreed that it is unrealistic if ''the wedded couple demand that their union shall satisfy desire permanently,'' though only marriage has, to its credit, set up such an ideal. But this carries a danger. ''We know for certain that desire gratified, cools sooner or later and that endeavors to make permanent the fugitive hours of romance would be vain.'' He tells the socialists that ''we cannot blame marriage because it is unable to change our earthly life into an infinite series of ecstatic moments, all radiant with the pleasures of love'' (p. 85). Most marriages, said Mises, do not fit the socialist caricature—bitter, pathological, abusive—especially not those ''blessed with children.'' In these ''married love fades slowly and unnoticeably; in its place develops a friendly affection which for a long time is interrupted ever and again by a brief flickering of the old love; living together becomes habitual, and in the children, in whose development they relive their youth, the parents find consolation for the renunciation they have been forced to make as old age deprives them of their strength'' (pp. 83–84).

Mises notes that ''no other German socialist book was more widely read or more effective as propaganda than August Bebel's *Woman and Socialism,* which is dedicated above all to the message of free love'' (p. 74). This is because ''free love is the socialist's radical solution for sexual problems'' (p. 87). Under free love, ''choice in love becomes completely free'' so men and women ''unite and separate just as their desires urge.'' All children are nurtured, maintained, and educated by the state. And ''relations between the sexes are no longer influenced by social and economic conditions.''

The response of the moral theologian, however, is ''entirely inadequate'' (p. 87). To Mises, radical sexual freedom is not in the interest of men or women. Free love debases sexuality and reduces beauty and sensuality

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to promiscuity and force. It is only marriage that unites a man and a woman "as equal, freeborn companions and comrades." The contract allows the woman to "deny herself to anyone" and to "demand fidelity and constancy from the man to whom she gives herself" (p. 91). Free love wars against nature, as do all "pseudo-democratic" efforts to "efface natural and socially conditioned inequalities." In their campaign for absolute equality, the socialists pursue a consistent pattern. They work to "make women the equal of men," a goal which nature will not allow, just as it will not sustain the socialist attempt to "make the strong equal to the weak, the talented to the untalented, and the healthy to the sick" (p. 90).[5]

With regard to the state child care that free love advocates demand, Mises wrote that "to take away a woman's children and put them in an institution is to take away part of her life; and children are deprived of the most far-reaching influences when they are torn from the bosom of the family." For a person to grow up as a "healthy human being," the parents must teach the child to love. That is why state child care leads to "neurosis and homosexuality" (p. 91). "[I]t is no accident," says Mises, that Plato, who "saw only the satisfaction of a physical craving in the relations between the sexes," also proposed to "treat men and women as radically equal, to regulate sexual intercourse by the state," and "to put infants into public nursing homes at birth" (p. 91).

C. *Feminism as a Revolt Against Nature*

Mises made a sharp distinction between two kinds of equality. The first demands that the law treat everyone impartially. The second wages war on nature by demanding that all natural and social inequalities be eliminated. Mises thought that the pursuit of the second would always result in the elimination of the first. That is to say, the pursuit of absolute equality means that people will be treated unequally—and unjustly—through state coercion.

Mises writes disapprovingly in *Liberalism* (1927) of the early liberals who thought "God created all men equal, endowing them with fundamentally the same capabilities and talents, breathing into all of them the breath of His spirit. All distinctions between men" were thought to be the "product of social, human—that is to say, transitory, institutions." The socialists advocate a different kind of equality, but based on the same presupposition. Of these views, Mises writes that "nothing" is as "ill-founded as the assertion of the alleged equality of all members of the human

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race. . . . Men are not equal, and the demand for equality under the law can by no means be grounded in the contention that equal treatment is due to equals'' (p. 28). It is because Mises praised equality before the law, and rejected ''radical equality,'' that he had no sympathies for the feminists.

The ''feminism of the nineteenth century,'' which Mises rejected, held that marriage forced personal sacrifice on women and denied them all freedom, while it ''gave man space enough to develop his abilities.'' This was the ''unchangeable nature of marriage, which harnesses husband and wife together and thus debases the weaker woman to be the servant of the man.'' To the nineteenth-century feminists, no reform of marriage is possible; ''the abolition of the whole institution alone could remedy the evil.'' What should replace it is ''loose relations which gave freedom to both parties'' (Mises, 1922, p. 86). Neither did Mises sympathize with twentieth-century feminism. Both overlook ''the fact that the expansion of woman's powers and abilities is inhibited not by marriage, not by being bound to man, children, and household, but by the more absorbing form in which the sexual function affects the female body'' (p. 86).

Of the demand for radical equality, Mises says that ''the difference between sexual character and sexual destiny can no more be decreed away than other inequalities of mankind. It is not marriage which keeps woman inwardly unfree, but the fact that her sexual character demands surrender to a man and that her love for husband and children consumes her best energies. There is no human law to prevent the woman who looks for happiness in a career from renouncing love and marriage. But those who do not renounce them are not left with sufficient strength to master life as a man may master it. It is a fact that sex possesses her whole personality, and not the facts of marriage and family, which enchains a woman. By 'abolishing' marriage one would not make woman any freer and happier; one would merely take from her the essential content of her life, and one could offer nothing to replace it'' (p. 90).

To Mises, these unalterable facts influence the division of labor between men and women. He explored what he regarded as women's natural limitations in the division of labor, and their ability to achieve genius and greatness on the level of men: ''Pregnancy and the nursing of children claim the best years of a woman's life, the years in which a man may spend his energies in great achievements. One may believe that the unequal distribution of the burden of reproduction is an injustice of nature, or that it is

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unworthy of woman to be child-bearer and nurse, but to believe this does not alter the fact. It may be that a woman is able to choose between renouncing either the most profound womanly joy, the joy of motherhood, or the more masculine development of her personality in action and endeavor. It may be that she has no such choice. It may be that in suppressing her urge towards motherhood she does herself an injury that reacts through all other functions of her being. But whatever the truth about this, the fact remains that when she becomes a mother, with or without marriage, she is prevented from leading her life as freely and independently as a man. Extraordinarily gifted women may achieve fine things in spite of motherhood; but because the functions of sex have the first claim upon woman, genius and the greatest achievements have been denied her'' (p. 86).

Mises summarized his position on feminism by distinguishing between the claim that women be granted an equal legal position with that of men—a desire fully in accord with capitalism and nature—and the more radical claim of absolute equality, which is akin to socialism. He wrote: ''So far as feminism seeks to adjust the legal position of woman to that of man, so far as it seeks to offer her legal and economic freedom to develop and act in accordance with her inclinations, desires, and economic circumstances—so far it is nothing more than a branch of the great liberal movement, which advocates peaceful and free evolution. When, going beyond this, it attacks the institutions of social life under the impression that it will thus be able to remove the natural barriers, it is a spiritual child of socialism. For it is a characteristic of socialism to discover in social institutions the origin of unalterable facts of nature, and to endeavor, by reforming these institutions, to reform nature'' (p. 87).

Efforts to enlist feminism on the side of liberty would be doomed to failure, in Mises's view, since the two ideologies are in fundamental disagreement regarding the limitations that nature has placed on human possibilities (compare McElroy, 1982, pp. 3–26). It is for this reason that Mises saw public policy on the relationship between the sexes as having reached the ideal by the early twentieth century. ''Nowadays the position of the woman differs from the position of the man only in so far as their peculiar ways of earning a living differ'' (Mises, 1922, p. 82). What was left of the old order did not concern him: ''The remnants of man's privileges have little importance. They are privileges of honor. The wife, for instance, still bears her husband's name'' (p. 82).

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Neither was Mises concerned about laws regulating private life. "Now man and woman are equal before the law," Mises writes. "The small differences that still exist in private law are of no practical significance. Whether, for example, the law obliges the wife to obey her husband is not particularly important; as long as marriage survives one party will have to follow the other and whether husband or wife is stronger is certainly not a matter which paragraphs of the legal code can decide" (p. 89).

Mises reserved his harshest criticism for the political ends of feminism. He regarded the laws against women's suffrage and their election to public office as largely expressing what is inherent in nature. Mises writes: "Nor is it any longer of great significance that the political rights of women are restricted, that women are denied the vote and the right to hold public office. For by granting the vote to women the proportional political strength of the political parties is not on the whole much altered; the women of these parties which must suffer from the changes to be expected (not in any case important ones) ought in their own interests to become opponents of women's suffrage rather than supporters. The right to occupy public office is denied women less by the legal limitations of their rights than by the peculiarities of their sexual character. Without underestimating the value of the feminists' fight to extend woman's civil rights, one can safely risk the assertion that neither women nor the community are deeply injured by the slights to women's legal position which still remain in the legislation of civilized states" (pp. 89–90).

III. Race and Ethnicity

Mises's cultural traditionalism also led him to oppose egalitarianism as regards the traits distinctive to particular racial and ethnic groups. He believed that all human beings are inherently unequal, and that these inequalities can be generalized according to the social patterns that develop in terms of race and ethnicity. He viewed scholarship that seeks to study such racial and ethnic differences, within the proper scientific context, as legitimate. However, he condemned state-imposed distinctions among various groups and wanted all of them, regardless of what might be their intellectual and social capacities, incorporated into the division of labor.

From the outset Mises condemned the theory of racial determinism and rigid racial categorization, especially when it was defended by pseudo-science. He expressed frustration and even disgust at some of the attempts

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to differentiate between racial groups. In *Nation, State, and Economy* (1919), among Mises's earliest works, he writes: "What has so far been discovered in [racial] sciences in quite scanty, of course, and is overgrown with a thicket of error, fantasy, and mysticism" (p. 11). He objected to the racialists' unscientific procedures, which he found "impossible to condemn too emphatically" (Mises, 1922, p. 289). They focused on race "in an entirely uncritical spirit." "More anxious to coin catchwords than to advance knowledge, they scoff at all the standards demanded by scientific thought." As a result of such blunders "scientific knowledge" of the innate qualities of man "is still in its infancy" (p. 288). As an example of bad science, he writes of the "cranial index" of Georges Vacher de Lapouge, which was based on postulating firm relationships between the physical and the mental that "do not exist." "More recent measurements have shown that long-headed men are not always blond, good, noble, and cultured, and that the short-headed are not always black, evil, common, and uncultured" (p. 289).

Moreover, Mises ruled out the idea that races can be measured against a "pure" standard since "all peoples have arisen from a mixture of races." It can even be shown that often the people at the "lower strata" of society are of purer "blood" than those of the upper orders, where "foreign ancestors" are common (Mises, 1919, p. 10). Thus the source of perceived racial advantages cannot relate purely to biology: "The undisputed outcome of . . . scientific investigations is that the peoples of white skin, Europeans and non-European descendants of emigrated European ancestors, represent a mixture of various bodily characteristics." Nor has science successfully related body size to mental and moral characteristics: "All these endeavors have also failed" (Mises, 1944, p. 182).

As a determinant in the course of world events, people's association with a "nation," defined in terms of language, is of "great importance" when compared to the "slight significance" that race plays in shaping cultural and political movements. And the a priori argument to the contrary, that race is the most important factor in world events, Mises regarded as sheer dillettantism (Mises, 1919, p. 11).

Yet Mises thought that racial factors were important in social and cultural development and that the possibility of legitimate scientific investigation into these factors should not be ruled out. We should not be misled "into skipping lightly over the race problem itself. Surely there is hardly any

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other problem whose clarification could contribute more to deepening our historical understanding. It may be that the way to ultimate knowledge in the field of historical ebb and flow leads through anthropology and race theory.'' ''There exists true science in this field. . . .'' ''It may be that we shall never solve'' the scientific problems associated with race studies, ''but that should not make us deny the significance of the race factor in history'' (p. 11). Mises would not renounce racial studies, since ''there still remains a germ of the race theory which is independent of the specific differentiation between noble and ignoble races'' (Mises, 1922, p. 289).

One can say that ''some men are more gifted by birth than others''; that men differ in their physical and psychic qualities; that ''certain families, breeds, and groups of breeds reveal similar traits''; and that ''we are justified in differentiating between races and in speaking of the different racial qualities of individuals'' (p. 289). There are even ''considerable bodily differences between the members of various races; there are also remarkable although less momentous differences between members of the same race, sub-race, tribe, or family, even between brothers and sisters, even between non-identical twins'' (Mises, 1957, pp. 326–27). And ''it is a historical fact that the civilizations developed by various races are different,'' for example (p. 322). It is ''unassailable'' that ''some races have been more successful than others in their efforts to develop a civilization'' (p. 334). All this is possible to observe scientifically and sociologically, even though attempts to find ''somatic characteristics of racial relationships have had no result'' (Mises, 1922, p. 288).

The kind of racial study he thought most important from the standpoint of classical liberalism would posit the following thesis: that ''certain influences, operating over a long period, have bred one race or several, with specially favorable qualities, and that the members of these races had by means of these advantages obtained so long a lead that members of other races could not overtake them within a limited period of time.'' While Mises was not willing to say whether this statement contains absolute scientific truth, he thought it most compatible with the methods of science. We must ask ''how it stands in relation to the theory of social cooperation'' (pp. 289–90).

Even granting that certain races have ''specially favorable qualities'' does not necessarily mean these qualities are entirely biological; they could be predominantly environmental and cultural (pp. 289–90). Sometimes

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environmental and cultural conditions can manifest themselves in physical, intellectual, and moral qualities: "Men living under certain conditions often acquire in the second, sometimes even in the first generation, a special physical or mental conformation. . . . Very often poverty or wealth, urban or rural environment, indoor or outdoor life, mountain peaks or lowlands, sedentary habits or hard physical labor stamp their peculiar mark on a man's body" (Mises, 1944, pp. 170–71).

Environment alone, however, cannot account for all group differences. If that were true, as the Marxists claim, it would be possible to adjust environment in a successful effort to equalize all human differences. It is in the context that Mises reminds that "there is a degree of correlation between bodily structure and mental traits. An individual inherits from his parents and indirectly from his parents' ancestors not only the specific biological characteristics of his body but also a constitution of mental powers that circumscribes the potentialities of his mental achievements and his personality" (Mises, 1957, p. 327). The attempt to change this is at odds with the doctrine of equality under the law (p. 328).

Most important from a methodological standpoint, whatever the racialists say and "no matter how great . . . differences may be, they do not affect the logical structure of the human mind. There is not the slightest evidence for the thesis developed by various schools of thought that the logic and thinking of different races are categorically different" (p. 327). This point is crucial, since Mises's system of deducing economics from human action relies on the universal validity of logic.

As a cautionary note, he wrote in one of his last books, *Theory and History* (1957), that there is no justification for one group feeling "racial self conceit." What may be true for the past is not necessarily true for the future. For this reason, historians should not adopt a "racial interpretation of history" (p. 334). Asserting racial superiority can also have pernicious consequences on one's personal ethics: "innocuous vanity" can "easily" turn to "scorn of those who do not belong to the same distinguished group and into an attempt to humiliate and to insult them." This kind of behavior has "poisoned the relations between the races for ages to come" (pp. 334–35). Moreover, Mises vociferously opposed any talk of eugenics, arguing that "[i]t is vain for the champions of eugenics to protest that they did not mean what the Nazis executed. Eugenics aims at placing some men, backed by the police power, in complete control

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of human reproduction. It suggests that the methods applied to domestic animals be applied to men'' (Mises, 1947, p. 78).

Whatever the results of the studies of racial differences, Mises said they would in no way affect his view that the free society and the division of labor are the best ways to deal with group differences. Race theory ''cannot in any way refute'' the case for liberalism (Mises, 1957, p. 328) since race theory and the liberal society ''are quite compatible'' (Mises, 1922, p. 289). ''It may be assumed that races do differ in intelligence and will power, and that, this being so, they are very unequal in their ability to form society, and further that the better races distinguish themselves precisely by their special aptitude for strengthening social cooperation'' (pp. 289–90).

It is the free market, and the law of comparative advantage, that makes cooperation between the races possible. Classical liberalism argues that free labor is more productive than unfree labor, and that, said Mises, is a sufficient reason for favoring liberalism. Liberalism in no way depends on the ''natural-law postulate of the equality or equal rights of all men.'' ''It may be admitted that the races differ in talent and character and that there is no hope of ever seeing those differences resolved. Still, free-trade theory shows that even the more capable races derive an advantage from associating with the less capable and that social cooperation brings them the advantage of higher productivity in the total labor process'' (p. 290).

It is when race theory begins to conflict with the classical liberal order that Mises objects most strongly—especially in his *Omnipotent Government* (1944), which focused on Nazi ideology. When race war is advocated at the expense of social cooperation, race theory becomes a force for evil. Mises pointed out that race war is not to be desired from any point of view. ''Lapouge has pointed out that only in the case of primitive peoples does war lead to the selection of the stronger and more gifted''; ''among civilized peoples it leads to a deterioration of the race by unfavorable selection'' since ''the fit are more likely to be killed than the unfit.'' And those ''who survive the war find their power to produce healthy children impaired by the various injuries they have received in the fight'' (Mises, 1922, pp. 290–91).

The emergence of Hitler led Mises to discuss race and ethnicity in light of recent history. As Mises has warned, state enforcement of racial purity had led to conflict and war. Those race theorists whose unscientific studies

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Mises found "impossible to condemn too emphatically" achieved power under Nazism. In opposition to them, Mises writes in 1944 that the "Aryan hypothesis was scientifically disproved long ago. The Aryan race is an illusion." It was bound to be, like all theories that posit a "pure stock" among white people. Hence Mises condemned the Nazi campaign against the Jews: It was morally wrong as well as scientifically incorrect, since there is no "alleged Jewish or Semitic race." "It has proved impossible to differentiate the Jewish Germans anthropologically from the non-Jewish ones." "Negroes and whites differ in racial—i.e. bodily—features; but it is impossible to tell a Jewish German from a non-Jewish one by any racial characteristic" (Mises, 1944, p. 182).

With regard to private discrimination based on preferences for one race or ethnic group or another, Mises thought such activity was permissible and natural, but that the market would tend to make it costly. "In an unhampered market society there is no legal discrimination against anybody. Everyone has the right to obtain the place within the social system in which he can successfully work and make a living. The consumer is free to discriminate, provided that he is ready to pay the cost" (p. 182). "In a world in which people have grasped the meaning of a market society, and therefore advocate a consumer's policy, there is no legal discrimination against Jews. Whoever dislikes the Jews may in such a world avoid patronizing Jewish shopkeepers, doctors, and lawyers" (p. 184).

Mises wanted to broaden the usual condemnation of unequal treatment under the law by pointing to economic interventionism as "compulsory discrimination, which furthers the interest of a minority of citizens at the expense of the majority." Under interventionism, various groups strive to form a political alliance to obtain privileges. The farmers attempt to enforce discrimination against foreign products, and this intervention burdens the rest of the community. Moreover this legal discrimination "need have nothing to do with hatred or repugnance toward those against whom it is applied." As an example, "the Swiss and Italians do not hate the Americans or Swedes; nevertheless, they discriminate against American and Swedish products. People always dislike competitors" (p. 184).

Economic interventionism must by necessity lead to wider and wider legal discrimination, until it ends in cruelties toward ethnic minorities, especially Jews. "In a world of interventionism only a miracle can in the long run hinder legal discrimination against Jews," said Mises. "The policy

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of protecting the less efficient domestic producer against the more efficient foreign producer, the artisan against the manufacturer, and the small shop against the department store and the chain stores would be incomplete if it did not protect the 'Aryan' against the Jew'' (p. 184). It was not hatred of other racial or ethnic groups, however, that Mises blamed for racial conflict. It was their reflection in state policy that treated different groups in different ways. Whether these groups were organized along economic or racial lines, to the extent that the state bestowed privileges on minority interests—whether farmers or racial and ethnic minorities—at the expense of the majority (or on the majority at the expense of a minority), it created social conflict and contradicted the principles of a free society.

Thus Mises treats the issue of race and ethnicity as an anti-egalitarian scientist who defers to the natural patterns of group interaction, even if these patterns imply systematic discrimination by one group against another. As a justification for such action, he rejected the theoretical grounding of most of the race theorists of his time. But he did not shrink from the conclusion that certain groups might have advantages over other groups in particular areas, and even saw justification in speaking of superior group traits. Thus he rejected all attempts to equalize groups, and all attempts to treat them differently by law. Group differences were best harmonized in the liberal market order.

IV. "Multiculturalism"

Mises was emphatically pro-Western, for he valued freedom above all, and saw the West as responsible for the idea of freedom. The idea can be traced to the Greeks, since they ''were the first to grasp the meaning and significance of institutions warranting liberty'' (Mises, 1950, p. 303). Despite the oligarchies of Greece, the ''essential tenor of Greek ideology was the pursuit of liberty'' (p. 305). Their ideas were transmitted to the Romans and later to Europe, and through the Europeans to America. The Western idea of liberty led to representative government, the rule of law, independent courts, habeas corpus, judicial examination, freedom of speech, and separation of church and state. The West ''transformed the subjects of tyranny into free citizens'' (p. 304).

This contrasts with the East. The ''ancient works of Oriental philosophy and poetry can compare with the most valuable works of the West'' (p. 311). But the West overtook the East because of the Western emphasis

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on freedom. As a result, "for many centuries the East has not generated any book of importance. The intellectual and literary history of modern ages hardly records any name of an Oriental author. The East has no longer contributed anything to the intellectual effort of mankind. The problems and controversies that agitated the West remained unknown to the East. In Europe there was commotion; in the East there was stagnation, indolence and indifference" (p. 311).

The West, unlike the East, thought that the power of despots ought to be questioned, that the individual should be independent of the state, and therefore it was necessary to create a "legal framework that would protect the private citizens' wealth against confiscation on the part of the tyrants." Since in the East no wealth was protected except that of the rulers, "big-scale capital accumulation was prevented." No middle class developed, and thus there "was no public to encourage and to patronize authors, artists and inventors." The children of the East "know nothing else than to follow the routine of their environment": advancement through the state (p. 311).

In contrast, "the alert youth of the West looks upon the world as a field of action in which he can win fame, eminence, honors, and wealth; nothing appears too difficult for his ambition." "The noble self-reliance of Western man found triumphant expression in such dithyrambs as Sophocles's choric Antigone-hymn upon man and his enterprising effort and Beethoven's Ninth Symphony. Nothing of the kind has been ever heard in the Orient" (pp. 311–12).

The idea of liberty made possible the wealth of the West. Other civilizations reject Western ideas, while longing for the material benefits of capitalism. "The non-Caucasians may hate and despise the white man," says Mises; "they may plot his destruction and take pleasure in extravagant praise of their own civilizations. But they yearn for the tangible achievements of the West, for its science, technology, therapeutics, its methods of administration and of industrial management" (Mises, 1957, p. 332). "Whatever people may say about Western civilization, the fact remains that all peoples look with envy upon its achievements, want to reproduce them, and thereby implicitly admit its superiority." But other cultures will fail to achieve the West's prosperity so long as they insist on "preserving their traditional rites and taboos and their customary style of life" (p. 333).

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But was not communism also a product of the West? Mises replies that no one advocating absolutism would get a hearing in the West, and that communism had to be disguised as "super-liberalism, as the fulfillment and consummation of the very ideas of freedom and liberty" (Mises, 1950, p. 306). Moreover, the communists were free to write and publish in the West, whereas ideas contrary to the rulers of the East were not to be aired.

To Mises, however, the superiority of the West is not necessarily permanent. It would inevitably decline if "the scions of the builders of the white man's civilization should renounce their freedom and voluntarily surrender to the suzerainty of omnipotent government" (p. 312). Nor can the West's superiority, no matter how relevant to the past, be used to predict the future (Mises, 1957, p. 335).

V. Literature and the Arts

On sex, the family, and feminism, Mises held that the capitalist order reinforces the natural order, while believing that it was futile to work against man's nature and the institutions it produced. With regard to social patterns that express themselves along racial or ethnic lines, Mises thought the capitalist order would eliminate conflict by integrating everyone into the division of labor, so long as the legal order did not discriminate among groups.

The situation was different with regard to literature and the arts. Here, Mises heartily disapproves of what the market tends to reward and champions an older tradition, explaining that his disapproval of popular culture and counterculture ideology did not affect his defense of the market. The critics of capitalism often argued that the market rewards inferior work in literature and the arts. Mises shared the preferences of many of these critics, but believed that mass culture is the "ransom mankind must pay" so that genius will have the freedom to work (Mises, 1956, p. 108).

Great literature, Mises thought, is not likely to be successful in the marketplace. "Literature is not conformism, but dissent. Those authors who merely repeat what everybody approves and wants to hear are of no importance. What counts is the innovator, the dissenter, the harbinger of things unheard of. . . . He is precisely the author whose books the greater part of the public does not buy." "The dissenter and innovator has little to expect from the sale of his books on the regular market" (p. 51).

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The book tycoon caters to the public, which does not always "prefer bad books to good books"; the "buyers lack discrimination and are, therefore, ready to absorb sometimes even good books." Nonetheless, "it is true that most of the novels and plays published today are mere trash." This is largely due to the amount produced, and that—under capitalism—the public, not just the intelligentsia, has for the first time the opportunity to influence what books are written and sold. "It is not the fault of capitalism that the common man does not appreciate uncommon books" (p. 51). "What characterizes capitalism is not the bad taste of the crowds, but the fact that these crowds, made prosperous by capitalism, become 'consumers' of literature—of course, of trashy literature. The book market is flooded by a downpour of trivial fiction for the semi-barbarians. But this does not prevent great authors from creating imperishable works" (p. 79). Even if only one out of 1,000 books published each year were "equal to the great books of the past" then "our age could still some day be called an age of the flowering of literature" (p. 51). Mises suggested that critics who attack the market for its literature "inculpate their own inability to sift the chaff from the wheat."

"Everybody is free to abstain from reading books, magazines, and newspapers he dislikes and to recommend to other people to shun these books, magazines, and newspapers" (p. 56). And Mises did so. He attacked the popular literature of his day, especially what he saw as promoting socialism. Chief among his targets were detective stories where the villain is a member of the "successful bourgeois," apparently respectable and widely considered incapable of wrongdoing, but then caught by a sleuth suspicious that all successful people are corrupt underneath. Mises also attacked "proletarian" novels as "nothing but trash." His aesthetic elitism never took the form of advocating legal discrimination, however; indeed he argued against it. But he never shrank from personal discrimination, or denouncing books he did not like.

So it is with architecture. Mises says that "modern architecture has not attained the distinction of that of past centuries," not even the "New York skyline" despite its "peculiar grandeur." He cites several reasons for this. With regard to religious buildings, the "accentuated conservatism" of the churches shuns innovation. There are no more palaces because "the wealth of the entrepreneurs and capitalists is . . . so much inferior to that of kings and princes that they cannot indulge in such luxurious construction. No one is today rich enough to plan such palaces as that of Versailles or the Escorial." And government buildings are dull because "committees and

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councils are not likely to adopt the ideas of bold pioneers.'' Though such grand projects may never return, in the modern era architectural genius is expressed on a smaller level. ''Only in apartment houses, office buildings and private homes have we seen something develop that may be qualified as an architectural style of our age'' (p. 78).

As far as art and architecture are concerned, genius must have the freedom to breathe. When freedom creates base culture, it is the fault of the masses. Says Mises: ''It is not the fault of capitalism that the masses prefer a boxing match to a performance of Sophocles's Antigone, jazz music to Beethoven symphonies, and comics to poetry'' (Mises, 1958, p. 27). ''The moral corruption, the licentiousness and the intellectual sterility of a class of lewd would-be authors and artists is the ransom mankind must pay lest the creative pioneers be prevented from accomplishing their work. Freedom must be granted to all, even to base people, lest the few who can use it for the benefit of mankind be hindered'' (p. 108).

How could Mises deliver such harsh judgments on aesthetic issues? Does liberalism not mean tolerance? Indeed, in *Liberalism* (1927) Mises writes that ''[l]iberalism demands tolerance as a matter of principle, not from opportunism. It demands tolerance even of obviously nonsensical teachings, absurd forms of heterodoxy, and childishly silly superstitions. It demands toleration for doctrines and opinions that it deems detrimental and ruinous to society and even for movements that it indefatigably combats. For what impels liberalism to demand and accord toleration is not consideration for the content of the doctrine to be tolerated, but the knowledge that only tolerance can create and preserve the condition of social peace without which humanity must relapse into the barbarism and penury of centuries long past'' (pp. 56–57). By toleration, however, Mises means that coercion ought not to be used to prevent the public from being exposed to these ideas—not that the public should grant even passive approval to them. In fact, it is the job of the liberal to discourage that approval. ''Against what is stupid, nonsensical, erroneous, and evil, liberalism fights with the weapons of the mind . . . '' (p. 57).[6]

VI. Summary

In sum, we see that Ludwig von Mises held many cultural positions central to modern American traditionalist conservatism, all of which are centered on his anti-egalitarianism. He favored traditional families organized on the principle of patriarchy and viewed the accompanying obligation

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of fidelity as binding; he thought that such institutions as the family and marital fidelity were natural, exclusively civilized, and highly desirable; he thought it was possible to make generalizations about races and ethnic groups when they exhibit distinctive traits, to study these differences, and even to use racial and ethnic generalizations as principles of action, while opposing any legal discrimination among groups; he praised Western civilization as superior to all others because it is the fount of liberty and capitalism; and he criticized mass culture and counterculturalism while favoring Western literature and arts that had stood the test of time.

VII. Some Points of Analysis

What follows are the authors' thoughts on some points in Mises's analysis that we find particularly interesting:

1. The cultural thought of Ludwig von Mises has received virtually no attention from Misesian scholars, though it is clear that his framework is rich in analytical possibilities. Besides its consistency, the most distinctive mark is his cultural traditionalism, which bears strong resemblance to orthodox religious ethics on matters of sexuality, marriage, free love, and promiscuity.

Yet it is important to view Mises as he was: a value-free scientist, a rationalist, and a utilitarian. A brief perusal of the writings of modern American conservative thought (Buckley, 1970) shows sharp differences with the Misesian approach. Mises took great care to arrive at his cultural views (excluding here his purely aesthetic preferences) through deductive means. His thinking on the institution of the family and fidelity demonstrates this most clearly. Nowhere does he defer to tradition or theism. Instead, for Mises, the family and fidelity are natural outgrowths of the division of labor (supported by pervasive inequality), and the need for sexual relations governed by contract.

This is not to suggest that religion did not have a tacit influence on the non-religious Mises, although his Jewish parents were also non-religious. The culture of Mises's Austria, and the University of Vienna where he studied, was heavily Catholic. Even Mises's own tradition of the Austrian school of economics had as its founder Carl Menger, a disciple of the Thomist philosopher Franz Brentano (Grassl and Smith, 1986). Menger's economic ideas, in turn, have much in common with those of the late scholastics (Chafuen, 1986).

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This cannot be taken too far, however, for Mises credited capitalism and the industrial revolution for advances in liberty, contract, and voluntarism—not Christianity. He sought to set capitalism and Christianity against each other in terms of their respective historical contributions (Mises, 1922). This did not mean, however, he was hostile to religion as such. "It would be a serious mistake to conclude that the sciences of human action and the policy derived from their teachings, liberalism, are antitheistic and hostile to religion" (Mises, 1949, p. 155). The problem was anti-capitalism. "The churches of all denominations," Mises complained, are promoting economic fallacies instead of teaching "Christian doctrine" (Mises, 1945, p. 231).

2. For Mises, cultural and sociological analysis that subverts "social institutions" that are the product of the "unalterable fact of nature" is highly dangerous. It is in this sense that Mises can be most comfortably called a conservative: What is, should be preserved, with the proviso that its origins are consistent with social cooperation. For him, only socialists would argue against those institutions, whether by disputing the results of economic cooperation (for example, price formation and income distribution) or patterns in sexual relations. Only to the extent that social conditions are the result of exogenous aggression (state or private) are they to be fought and rebuilt on a foundation of private property, contract, and the rule of law.

3. Mises can be seen as typical of twentieth-century laissez-faire economics, as the advocates of free markets have largely been associated with cultural traditionalism (Nash, 1976). Conversely, the advocates of socialism have been associated with cultural libertinism (Nisbet, 1984). Libertarians who regard themselves as "neither Left nor Right," and who therefore mix free markets with libertinism, dismiss this pattern as an accident, or as the result of Christian conservatives intent on promoting their religious agenda (see Kurtz, 1984).[7] But if there is coherence to Mises's position, it may assist in the development of a deeper understanding of the relationship between a free economic order and a traditionalist perspective on cultural matters.

In Mises, the connection between laissez faire and traditionalism can be seen in two ways. First, Mises—and most other economic libertarians—are vehemently anti-egalitarian, as shown above, and most cultural leftists support some sort of social and cultural leveling. Second, Mises and other

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economic libertarians regard the free market and traditional social institutions as in keeping with the natural order, whereas socialism and interventionism, as well as cultural libertinism, seek to upset this natural order and to impose designs on society that are alien to the social patterns of freedom. How this relates to Mises's apparent use of natural law-type constructs, in spite of his explicit rejection of natural law, ought to be the subject of further scholarly reflection.

4. Mises is often credited for having provided the best analytical framework for understanding the inevitability of the failure of socialism: its inability to calculate the relative usefulness of the collectively owned and thus non-traded means of production. Do his cultural and sociological criticisms of socialism have similar predictive power? Nineteenth-century socialists advocated free love, but it was not until the 1960s that it was openly practiced by the Left, creating what has been called the "destructive generation." Mises regarded this and other aspects of the sociological and cultural agenda of the Left as being as socialist as the desire to collectivize the means of production.

5. If we can think about welfarism as a halfway house to socialism, can we say that Mises correctly correlated the growth of interventionism with the breakup of the family and increased promiscuity (Murray, 1984)? If natural differences between the sexes and the requirements of the division of labor yielded the family, then the attempt to equalize the sexes will break down the division of labor, and *mutatis mutandis,* the family, as a fundamental unit of society. Scholars and policy groups concerned with family issues might do well to consider this.

It is also noteworthy that Mises claimed that capitalism saved humanity from sexual neurosis. The idea of contractual sexual relations freed both men and women from the psychological oppression of the disordered sexual lives that result from broken marriages and the socialist desire to abolish the institution altogether. Has the level of sexual neurosis and misconduct risen in conjunction with the level of economic interventionism?

6. Mises says that economic intervention, by definition, must favor some groups over others, so that intervention necessarily translates into unequal treatment of groups defined by their race and ethnicity. Could the plethora of race-based programs established by the U.S. government be directly correlated with its economic interventionism? Might working to reestablish a free economy also lay the intellectual groundwork for repealing laws that mandate racially and ethnically unequal treatment? Furthermore, Mises

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saw great danger in attempting to ground legitimate equality under law in a false notion of inborn equality. If the state imposed an equality that ignored possible patterns of different strengths and weaknesses among different groups, the rule of law would be undermined. Can it be argued that this has occurred in American society since at least the early 1960s (Williams, 1982)?

7. Mises leaves open the question of why it might be in the interests of women in traditional roles to oppose women's suffrage. Logical speculation produces the following possible deduction. Feminists are the ones most likely to exercise the vote once it is granted. Given their socialist intellectual framework, feminists would also support heightened state intervention, which is likely to make the lives of women who are full-time wives and mothers more difficult (with state child care, fewer tax breaks for motherhood, and cultural opposition to the family). Greater state intervention, by making most people poorer, also makes the maintenance of the traditional family with one wage earner more difficult.

Moreover, non-feminist wives and mothers will have less interest in being politically active. Thus, by default, women's suffrage leads to political power being exercised against non-feminists. It would be far better, Mises might have argued, for the non-feminists to oppose women's suffrage, than to live under the feminist domination that would logically follow the passage of women's suffrage. (Possibly instructive in this regard is Gilder, 1973).

8. Mises denied the cultural worth of many goods and services produced under capitalism, especially those associated with mass culture. For him, capitalism was not to blame for this, for the market reflects the moral character of the public. What is unclear is whether he thought a growing baseness of mass culture could undermine the intellectual foundations of the free market. He certainly thought that popular literature laden with leftist ideology (Mises gives the example of detective stories) had bad consequences. But did he see similar dangers in trashy but non-ideological mass culture?

Notes

1. Mises himself repudiated the term "conservatism" (see, e.g., Mises, 1961, p. 191; 1957, pp. 376 and 372), but by this he meant social systems characterized by "stagnation" and "rigidity," where the purpose of government is to "prevent any innova-

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tions that could endanger its own supremacy." This definition of conservatism would apply to Eastern cultures and Bismarckian welfarism. To Mises, writing in his time and place, conservatism had more in common with socialism (and American liberalism) than laissez faire. Our use of the term "traditionalist" is derived from its use in contemporary America, especially in the context of culture: an emphasis on family and anti-egalitarianism, and a preference for the enduring ideas, art, and literature of the West as versus popular culture.

2. Note the contrast between the economic and cultural thought of John Maynard Keynes and that of Mises. Keynes, like his philosophical mentor E. G. Moore, was a moral libertine. Of his years at Cambridge, Keynes stated flatly: "We repudiated entirely customary morals, conventions and traditional wisdom. We were, that is to say, in the strict sense of the term, immoralists. . . . [W]e recognized no moral obligation on us, no inner sanction, to conform or obey" (Skidelsky, 1986, pp. 142–43). Charles Rowley argues that Keynes's moral libertinism is linked with his anti-orthodox economics: "The young Keynes was to engage his energies in a sustained attack upon the moral order of Victorian England. The maturing Keynes was to launch an attack upon the fundamental precepts of classical political economy: the gold standard, laissez faire and the principle of budget balance." Moreover, Keynes "was an active participant in organizations that regularly indulged in criminal behavior . . . The hostility of the criminal to the specific laws that he is infringing usually extends to the wider rules and conventions of the society in question. . . . By setting himself without the law, Keynes predisposed himself to an attack on classical political economy which culminated in the *General Theory*" (Rowley, 1986, pp. 115 and 121).
3. The inequality of men is also cited as a point against universal public education. In addition to its potential for abuse by government officials (Mises, 1944, pp. 82–83 and 276), the goals of public education are unrealistic and socialistic. The U.S. "embarked upon the noble experiment" of "making every boy and girl an educated person" by making them "spend the years from six to eighteen in school." The goal of every American graduating from high school has been achieved only by "destroy[ing]" the "scholarly and scientific value" of high school. "If one lowers the scholastic standard of high schools and colleges in order to make it possible for the majority of less gifted and less industrious youths to get diplomas, one merely hurts the minority of those who have the capacity to make use of the teaching. The experience of the last decades in American education bears out the fact that there are inborn differences in man's intellectual capacities that cannot be eradicated by any effort of education" (Mises, 1961, pp. 195–96).
4. Mises advocated democracy as a procedural matter because he thought it the system best suited to social cooperation, a position growing out of Mises's rule-based utilitarianism. Every individual preference is to be considered equally valid for the social order, but every individual choice is not equally valid in a moral or aesthetic sense. On Mises and utilitarianism see Yeager, 1991.
5. At this point in Mises's exposition, he adds a footnote: "To examine how far the radical demands of feminism were created by men and women whose sexual character was not normally developed would go beyond the limits set to these expositions."

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6. The very discussion of tolerance presupposes the legitimacy of disapproval; if it were possible and desirable for everyone to be equally approving of all doctrines, cultures, and practices, there would be no reason to raise the question of toleration. See Mises, 1967, p. 218.
7. As to a possible connection between libertinism and statism, Kurtz's role in the drafting of the "Humanist Manifesto II (1973)" is instructive. The document calls for "a socialized and cooperative economic order, autonomous and situational ethics, . . . many varieties of sexual exploration, . . . and the development of a system of world law and order based on a transnational federal government." (see Martin, 1990, p. 295).

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Reciprocal Exchange as the Basis for Recognition of Law: Examples from American History

by Bruce L. Benson*

The literature of American legal history is primarily a history of federal and state governments, creating the false impression that these governments have produced and enforced all relevant law. Indeed, there seems to be a widely held belief that law and order could not exist in a society without the organized authoritarian institutions of the state. But while law can be imposed from above by some powerful authority, like a king, a legislature, or a supreme court, law can also develop "from the ground" (Berman, 1983, p. 274), as a result of a recognition of mutual benefits, through exchanged agreements (explicit or implicit contracts) to obey and participate in the enforcement of such law.

Groups whose law has been contractual, arising as a consequence of recognized reciprocity and exchange, have functioned very effectively throughout history (Benson, 1990).[1] Indeed, American history is full of examples of legal system which were not backed by a state authority. In order to illustrate how legal systems functioned without the backing of state authority, the following presentation is divided into five sections. First, a general "theoretical" discussion of the implications of law based on reciprocity and exchange is provided. Then several examples of non-state-backed legal systems in American history are detailed in light of the theoretical presentation: Various religious, ethnic and "utopian" communities are introduced in section II; American commercial law is discussed in section III; and in section IV, organizations such as land clubs, wagon trains, mining camps, and vigilantes that provided law and order on the western frontier are presented. Section V contains concluding comments.

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I. Reciprocity, Law, and "Social Contracts"

Lon Fuller (1964, p. 30) has defined law as "the enterprise of subjecting human conduct to the governance of rules."[2] Institutions must develop to support a system of rules by creating incentives to accept rules of conduct, facilitating dispute resolution, and supplying legal change when it is desired. Thus, legal systems involve an enterprise or process, and consequently they tend to display very similar structural characteristics (pp. 150–151).[3] Fuller's definition of law is accepted here, in part because it allows the analysis of law to focus on the institutions involved in the production and enforcement of legal rules and on the incentives which both lead to the development, and arise as a consequence, of those institutions.

Individuals can be forced to recognize law, or they can be persuaded to voluntarily avoid the proscribed behavior in recognition of personal benefits. If law is coercively imposed from above, then that law will require much more force to maintain social order than is required when law develops from the bottom, through mutual recognition and acceptance. Such law is recognized not because it is backed by the power of some strong individual or institution, but because each individual recognizes the benefits of behaving in accordance with other individuals' expectations, *given* that others also behave as he expects. That is, individuals "exchange" recognition of certain behavioral rules with one another for their mutual benefit. Individual A must agree (perhaps explicitly as through a contract, or perhaps implicitly through behavioral patterns that establish expectations) to act in a certain way in his relationship with B in exchange for B acting in a certain way in his relationship with A.

Disputes can arise in any legal arrangement, including those formed completely through mutual exchange, particularly as new and unforeseen circumstances arise that are not clearly covered by existing rules. Disputes can be resolved with violence, but that can be a very costly means of dispute resolution. In order to deter violent forms of dispute resolution, individuals have strong incentives to form mutual support groups for legal matters (indeed, there is clearly a simultaneous development of cooperation in law enforcement and other forms of interaction, since most interactions require some degree of certainty about legal obligations (Benson, 1989b)), wherein the group members are obligated to act as (or provide) third parties to adjudicate the dispute and then help enforce the adjudicated ruling. That is, group members exchange support for one another in order to resolve disputes without violence.

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Now the question becomes: What conditions are conducive to the evolution of a system of exchange that produces both recognized rules of conduct and third-party support in dispute resolution? Fuller (1964, pp. 23–24) suggests three conditions that make a legal (or moral) duty clear and acceptable to those affected: first, the relationship between the parties immediately affected must be voluntary; second, both parties must gain from the exchange; and third, the relationship must involve repeated contact so that the resulting duty can be reversible (i.e., what one individual is required to do at a particular time can be required of another at a different time).

Clearly, individuals must expect to gain as much or more than the costs they bear for voluntary cooperation to arise. Protection of personal property and individual rights is a very attractive benefit, so private property rights and the rights of individuals have constituted the most important primary rules of conduct in many historical and anthropological examples of legal systems wherein the source of recognition of law has been reciprocity (Popisil, 1971; Friedman, 1979; Peden, 1977; Benson, 1989a, 1990, 1991). In addition, if each contact between people is treated as a one-shot game, then cooperation may be unlikely. For instance, A has little incentive to behave in the desired way at one time, benefiting B, if there is no expectation of future contact when B can reciprocate. And moreover, if a dispute arises, third parties clearly have no incentive to support either A or B, because there is no reason to anticipate that A and/or B will have to reciprocate with support in the future. Beyond that, the loser in the dispute has no incentive to agree to the settlement other than fear of the winner.

If individuals anticipate that they will be in a long-term relationship with many potential future contacts, however, incentives will be quite different. In a repeated game with a finite and uncertain horizon, each individual has some probability of being in a situation in which he will benefit from cooperation at some point and cooperation becomes possible (see Axelrod, 1984). In this case the incentives to behave as expected are much stronger. Each individual never knows if he will be party to a dispute in the future, but each should assign some positive probability to being a disputant. Furthermore, an individual does not know whether the other party in the dispute will be strong enough (physically, politically, or economically) to resist his efforts to prosecute. Thus, individuals have incentives to exchange not only recognition of certain behavioral rules with one another for their mutual benefit, but also obligations to support one another in

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resolving disputes. The makeup of such groups (i.e., the institutional setting that produces the repeated-game incentives to cooperate) may reflect implicit contracts arising within a family and/or a religious group (Popisil, 1971; Hoebel, 1954; and Benson, 1989a), or because of geographic proximity (Benson, 1990, chap. 2) or functional similarity (Trakman, 1983; Benson 1989b), or they may result from explicit contractual arrangements (Friedman, 1979; Peden, 1977).

As with most cooperative arrangements, there may be incentives to cheat once the arrangement is established. If an individual can express a willingness to cooperate and obtain benefits from the cooperative arrangements but then not actually accept an adjudicated settlement when he loses, or not reciprocate when called upon to act as a third party, then such an arrangement will break down. The commitments must be credible. In a repeated-game context a commitment can be made credible if there is a credible potential response by the other players. Historical and anthropological evidence indicates that this response is likely to take the form of ostracism. The group members will only be obligated to aid someone else in a legal dispute if that individual is a member in good standing. Indeed, individuals who do not fulfill obligations to support others can be excluded from all future forms of social interaction (like trade, religious rites, and marriage) with other members of the group (Popisil, 1971; Hoebel, 1954; Benson, 1989a, 1989b, 1990, 1991; Trakman, 1983; Friedman, 1979; Peden, 1977). Similarly, individuals in the group will lose support if they do not agree to arbitration or mediation when a dispute arises and yield to a judgment that is acceptable to the other individuals in the group. Fear of this boycott sanction reinforces other self-interest motives associated with maintenance of reputation and reciprocal arrangements. In other words, because each individual has made an investment in establishing himself as part of the community (i.e., established a reputation), that investment can be "held hostage" by the community, a la Williamson (1983), in order to insure that the commitment to cooperate is credible. Thus, rules of conduct and peaceful dispute resolutions can be enforced without the backing of the state.

James Buchanan (1972, p. 37) has posed the following question: If government is dismantled, "how do rights reemerge and come to command respect? How do 'laws' emerge that carry with them general respect for their 'legitimacy'?" His answer is that a "social contract" or "con-

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stitution'' is required in order to define the rights of the people in the first place and to establish the institutions to enforce those rights (Buchanan, 1972, 1977). The production of law, however, can be achieved through the process of *individual* exchange and agreement, with the resulting rules spreading to other members of a group if they are useful rules. Such laws emerge spontaneously as a consequence of cooperation induced by reciprocities. Institutions for enforcement similarly evolve due to recognition of reciprocal benefits. Fuller (1964, pp. 128–129) maintains that law which develops from the bottom up through reciprocity and exchange is appropriately viewed as

> a branch of constitutional law, largely and properly developed outside the framework of our written constitutions. It is constitutional law in that it involves the allocation among various institutions . . . of legal power, that is, the authority to enact rules and to reach decisions that will be regarded as properly binding on those affected by them.

Consider the following examples from American history of attempts to establish legal order without the backing of state authority.

II. Contractual Law in American Communities

Kinship, religious beliefs, ethnic cultural norms, and/or close-knit geographic communities frequently provided the basis for the reciprocity among immigrants to the American continent. Jerold Auerbach (1983) documents several such cases. A few are discussed here to provide a view of the general character of these arrangements, but as Auerbach notes (p. 16), the examples in his book ''could easily be multiplied tenfold.''

A. *Colonial Religious Communities*

Some who came to America in the seventeenth century were fleeing religious oppression by the English government; they thus broke all the ties with that government they possibly could. They purposefully moved outside the reach of the English government's law and established their own legal systems. Religion's moral teaching provided their rules of law and the church arbitrated or mediated their disputes. Reciprocity was clearly relevant as individual sacrifices were great, but each individual's eternal salvation was believed to be the ultimate reward. Beyond that, however, incentives for reciprocal protection and law enforcement arose because

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these early religious communities (for example, the Massachusetts Bay) were isolated in a hostile environment.

One example of such legal systems was in the Puritan communities. They generally chose mediation when disputes arose. In this regard the role of the church was paramount. The church had jurisdiction over religious offenses like defilement of the Sabbath or heresy, of course, "but churches also resolved a variety of commercial and property disputes. These included questions of business ethics . . .; land title disagreements; and, as late as the beginning of the nineteenth century, allegations of breach of contract and fraud" (Auerbach, 1983, p. 23). Judicial procedure was standardized. The entire congregation typically participated in the dispute-resolution process. Individual members actively provided information, opinion, and admonition. This encouraged a collective congregational judgment, isolating offenders and thereby strengthening the social order.

These congregations employed a very effective threat of ostracism to induce compliance with their laws. "The sanctions of admonition and excommunication were sufficient for this purpose. The church could neither arrest a wrongdoer nor seize his property, but the danger of expulsion, where church and community were virtually co-extensive loomed ominously" (p. 24). Indeed, these communities would not accept into their midst someone who was not, in a sense, "bonded" by church affiliation.[4]

One of the most well-known religion-based legal systems of the colonial period outside of New England was that of the Quakers. Quakers were not only Christians, of course, but Quaker law also required pacifism, so keeping the peace was a predominant religious concern. In this regard, if a dispute arose

> the complainant, "calmly and friendly," spoke to the other party, trying "by gentle means, in a brotherly and loving manner to obtain his rights." If he was unsuccessful, he reasserted his claim in the company of one or two other "discreet, judicious friends," who were expected to act "justly and expeditiously" to resolve all differences. That failing, they were to "admonish and persuade" the parties to accept arbitration by disinterested Quakers. Refusal to arbitrate diverted the dispute to the monthly meeting. . . . The meeting appointed arbitrators; refusal to abide by their judgement was an intolerable affront to the entire community. . . . The penalty was disownment by the society (p. 30).

Clearly the procedures developed by the Quakers were designed to avoid confrontations that might lead to disruption of the society's peace.

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Quaker law reached well beyond religious matters despite being enforced through religious institutions. The Quakers also arbitrated business disputes, for example, and the Quaker economic system was very much in the "capitalist" mold, based on private property and free enterprise. Other religion-based legal systems had similar characteristics, though some did not.

B. *Non-State Legal Systems that Failed: Nineteenth-Century Utopian Communities*

Auerbach actually misinterprets some very basic points in his analysis. In particular, he focuses on the observed community order that he attributes to deliberate design in reflection of "strong communitarian impulse" (Auerbach, 1983, p. 19).[5] He does not recognize that such order typically arises from individual motivations interacting through reciprocal recognition of duty. As Fuller (1981, pp. 227–28) has stressed, when law is established without state backing,

> we must not be misled as to the process by which this extension takes place. It has sometimes been thought of as if it involved a kind of inarticulate expression of group will. . . . This kind of explanation abstracts from the interactional process underlying customary law and ignores their ever-present communicative aspect.

As a consequence of his failure to recognize this, Auerbach has a difficult time explaining certain events. For instance, several of the episodes of community-based law he discusses concerned nineteenth-century utopian communes. If a communitarian view is the essential ingredient for successful avoidance of state law, then these utopian communes should have succeeded; but if reciprocity is the basis for successful non-state-backed law, then these utopian experiments would fail.

Individualism and private rights were almost totally suppressed in the utopian communes. Tremendous sacrifice was expected. What did the individual get in return? "As intrusive as the scrutiny seems, and surely was, members were reassured of solicitous community concern for their welfare" (Auerbach, 1983, p. 52). It is interesting to note, in terms of this statement, that Fuller (1964, p. 20) predicted that "[w]henever an appeal to duty tries to justify itself, it does so in terms of something like the principle of reciprocity." Clearly, some people initially viewed this exchange as a sufficient reciprocal arrangement, but such feelings must

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have quickly faded. One characteristic of effective reciprocity noted above is that the parties must both gain from the exchange. Individuals, no matter how religious or idological, are not likely to be satisfied when they sacrifice something of greater value for something they value less.

Over 100 utopian communal societies established their own legal systems in the nineteenth century, primarily in New England and the Midwest. "The framework for resolving disagreements was mutual and consensual. . . . Peer pressure was relentless, ranging from surveillance by neighbors or leaders . . . to ferret out deviance, through moral suasion to guide erring members back to the community (through forms of confession and atonement), to the ultimate sanction of expulsion" (Auerbach, 1983, pp. 50–52). By-and-large they failed because they suppressed private property and individual rights, which generally provide the basis for the reciprocity necessary for recognition and participatory enforcement of such law. Other non-state legal systems were more effective in this regard.

C. *Law in Ethnic Immigrant Communities*

Chinese in urban Chinatowns, Scandinavians in Minnesota and North Dakota, as well as Eastern European and Jewish immigrants to Eastern American cities, all established their own legal order outside the federal, state, or local government that supposedly ruled over the geographic territories encompassing their communities. While commonality of religious beliefs was at times present, more important sources of reciprocal cohesion appear to have been kinship, ethnic cultural norms, and economic relationships. For instance, "American Chinatown were conspicuously insular" (Auerbach 1983, p 74). Law in China was largely kinship-based custom at the time of the large nineteenth-century migrations. Consequently, a system similar to that existing in Chinese villages was exercised through local benevolent associations in American Chinatowns. Merchant elders took on the role as mediators for communities consisting of numerous clans and local associations. Each such group took care of internal conflicts while a Consolidated Benevolent Association provided mediation of disputes between members of different groups. "Ostracism, mixed with shame of public scrutiny (and no doubt an occasional threat), was a strong deterrent" (p 75). The community-based system of law and internal conflict resolution did not begin to yield to state law enforcement until after World War II.

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"Among the various immigrant groups for whom internal dispute-settlement procedures were vital for community cohesion, none migrated with as strong a historical commitment to law, and as deep a mistrust of alien legal systems, as the Jews of Europe. Jews were a people whose religion was law; they clung to the Torah to preserve their identity as a people during two millennia in dispersion. . . . In the most literal respects the Torah was their living law" (p. 76). Similarly, there are few groups that are as clearly identified with capitalistic free trade and commerce as are European Jews. Throughout Europe, Jews maintained a strong desire for religious, cultural and economic autonomy. Thus, they enforced their own law through synagogues and the Bet Din (rabbinical courts). The Bet Din adjudicated virtually every kind of dispute among European Jews.

New York Jewry revived the European institution of *Kehillah* (community) in an effort to facilitate economic and cultural interaction. Rabbis did not have widespread followings in America, so they could not serve the strong adjudicative role they had played historically. However, the Jews' European experience led the Jewish *Kehillah* to establish a dispute-resolution system, beginning with a Bureau of Industry around 1910, to mediate and bring a degree of order to the clothing, fur, and millinery industries. Their success in industrial mediation led them, by 1914, to develop a court of arbitration and network of neighborhood arbitration boards to handle the full range of commercial and religious disputes p. 80). This system was dominant in the provision of law and order to the Lower East Side Jewish community until after World War I, and the principles established by the *Kehillah* persisted for some time beyond that.

The post-war period saw the New York Jewish community develop a variety of arbitration tribunals. Again the procedures were informal and disputes were resolved according to Jewish and Yiddish customary law. One important arbitration tribunal—the Jewish Arbitration Court—resolved thousands of disputes during the 1920s and had branch offices throughout the New York Jewish community. It was funded and staffed through philanthropic and professional support. This private court actually faced stiff competition in the market for disputes from the Jewish Conciliation Court of America (p. 86). As the Jewish Community was assimilated into American society, however, these courts gradually took on characteristics of the public courts and lost their ability to attract constituents.

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III. Merchant Production of Commercial Law in America

Many of the more successful non-state legal systems (like the Quaker, Mormon, Chinese, and Jewish) handled commercial disputes as well as religious or cultural issues. This should not be surprising, given that recognition and voluntary enforcement require reciprocity. Indeed, Fuller (1964, p. 24) notes that the kind of society in which the three conditions for optimal recognition of duty under reciprocally based law are most likely to be met is

> a society of economic traders. By definition the members of such a society enter direct and voluntary relationships of exchange. As for equality, it is only with the aid of something like a free market that it is possible to develop anything like an exact measure for the value of disparate goods. . . . Finally, economic traders frequently change roles, now selling, now buying. The duties that arise out of their exchanges are therefore reversible, not only in theory but in practice.

In this light, the historical fact that Auerbach has the most difficulty explaining—because of his emphasis on communitarian values—is the discovery that "commercial arbitration [and law] is the oldest continuing form of non-legal [that is, stateless] dispute settlement in American history. . . . Paradoxically, the pursuit of self-interest and profit generated its own communitarian values, which commercial arbitration expressed" (Auerbach, 1983, pp. 43–44). This is a paradox, of course, only when one views the necessary catalyst for law without the state to be a communitarian spirit. When the catalyst is recognized to be reciprocity, then the ability of the merchant community to make and enforce its own laws is not at all surprising. After all, reciprocity, in the sense of mutual benefits and costs, is the very essence of trade. Each party enters into an exchange because he or she expects to obtain something more valuable than what is given up. And most merchants expect to be in business for a long time, trading with many of the same people over and over again.

Commercial law was firmly established by the merchant community in Europe (though not by European state governments) centuries before colonies were settled in America (Trakman, 1983; Berman, 1983; Benson, 1989b). Merchants in America quickly moved to establish their own systems of law and dispute resolution; commercial arbitration was settling disputes in and between the New York and Philadelphia business communities soon

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after these settlements developed. Commercial law reflected business practice and custom, and its enforcement in America was dominated by private institutions through the eighteenth century.

Merchants established arbitration for several reasons. First, merchants wanted to be sure that commercial law would reflect business practice and custom. In addition, resolution of commercial disputes at times had to be achieved after consideration of relatively technical issues. Arbitrators were generally merchants from the relevant merchant community. Thus when technical issues were involved, the disputants used judges who were experts in that particular area of commerce, unlike government court judges who could adjudicate disputes about which they knew nothing. Furthermore, arbitration tended to be relatively speedy and informal. This characteristic is of course desirable to merchants—a dispute had to be settled quickly to minimize disruption of business affairs, and this speed and informality could not have been equitably achieved at the time without arbitration. Merchants avoided state judges and courts because those institutions did not apply commercial law in what the merchant community considered to be a just and expeditious fashion: "Not only did courts, according to one New York merchant, dispense 'expensive endless law'; they were slow to develop legal doctrine that facilitated commercial development" (Auerbach, 1983, p. 33).

Around the beginning of the nineteenth century, state courts began to apply the merchants' law as the merchants had established it, and the commercial arbitration system began to disappear. However, the potential for such a system always remained. When the public system became unwilling or unable to adjudicate as the merchant community demanded, commercial arbitration developed again in the United States. Thus there was a significant reemergence of commercial arbitration around the end of the nineteenth century. One factor in the reemergence was clearly the growing problem of court congestion and trial delay, but in addition, "the stronger the regulatory state, the stronger the desire for spheres of voluntary activity beyond its control. The growth of the regulatory state unsettled advocates of commercial autonomy who turned to arbitration as a shield against government intrusion" (p. 101).

The New York Chamber of Commerce established arbitration committees in 1768, and following a period of relative inactivity it evolved into a per-

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manent tribunal just before the end of the century. The main area of rapid redevelopment of commercial arbitration, however, was in the trade associations. Reciprocal benefits within trade associations, backed by the use of boycott sanctions against any member refusing to comply with arbitration, proved sufficient to elicit recognition of legal obligation. By the end of World War I, arbitration was the preferred practice among many of these groups, and it has since "grown to proportions that make the courts secondary recourse in many areas and completely superfluous in others" (Wooldridge, 1970, p. 101).

The American Arbitration Assocaition (AAA), the largest single group of arbitrators with twenty-five regional offices and 23,000 associates around the country in 1970, helped settle some 22,000 disputes that year. By 1978 the number of disputes settled through the AAA had increased by 118.2 percent, to 48,000 (Poole, 1978, p. 54). The fact is that since the Association's founding in 1926, entire classes of legal disputes have been removed from the courts altogether (p. 54). But the growth of AAA activity reflects only a relatively small portion of private sector arbitration. A study conducted in the mid 1950s, for example, found that the AAA conducted only 27 percent of all commercial arbitration (Mentschikoff, 1961, p. 857). Indeed, the main area of rapid redevelopment of commercial arbitration has continued to be in the trade associations. Statistical information as to the extent of arbitration today by non-AAA affiliates is not available (Landes and Posner, 1979, p. 250), but by the 1950s it was estimated that almost 75 percent of all commercial disputes were being adjudicated before arbitrators rather than public courts (Auerbach, 1983, p. 113); estimates in 1965 indicated that the use of commercial arbitration was increasing at about 10 percent per year (Lazarus, et al., 1965, p. 20). But commercial law is not the only example in American history of non-state law motivated almost exclusively by economic self-interest.

IV. The American West: Where Government Failed to Provide Law

Miners, farmers, ranchers, and many others moved westward much more rapidly than the government of the United States could expand its law enforcement system, particularly during the period from 1830 to 1900.[6] The American West, according to Elliot (1944, p. 189), lacked effective government, and this encouraged a sense of individualism that supposedly

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produced frequent violent confrontations, particularly on the mining and cattle frontiers. Similar arguments abound. Mondy (1943, pp. 167–77), for instance, argues there was no stable social order in the frontier; this presumably forced frontiersmen to act independently and establish social relationships on their own, without the framework of an existing order, leading to frequent violent confrontations and deaths. Mondy also cites the physical and cultural isolation of the frontier communities as contributing to violence.

Interestingly, writers like Elliot and Mondy provide no proof of the existence of widespread violence on the frontier. Rather, they simply assert that violence was prevalent and then proceed to explain why. In this same vein, Geis (1967, p. 357) writes that "[w]e can report with some assurance that, compared to frontier days, there has been a significant decrease in [crimes of violence]." But Geis provides no evidence. This same unsubstantiated claim is made by others. Frantz (1969, pp. 127–54) even suggests that American violence today reflects our frontier heritage.

Is there any evidence to support the assumption of frontier violence? A number of historians have focused on particular notorious individuals and/or events that were violent in character, and it has been assumed that they represent the general character of the Western frontier (McGrath, 1984, pp. 270–71). For example, the literature on gunfighters in the West is very large (it is also contradictory[7]), and clearly, some gunfighters were involved in a number of killings. The reasons for such violent behavior by specific individuals, according to these historians, correspond to the reasons given by authors cited above for generally high levels of violence in the West (for example, see Rosa, 1968).

Others have focused on specific events. Drago (1970), for instance, studied specific historical cases where violence broke out over the use of range lands. He actually points out in his introduction that such violent confrontations were not really very common (p. v). However, his subsequent chapters recount a series of violent disputes.

In addition to studies of specific violent acts and individuals, there are historical accounts of regions that have, for some reason or another, featured a particularly notorious event or individual. In this light, it is interesting to note that these studies end up finding a good deal of social order. Holden (1940, pp. 188–203), for example, studied the Texas frontier for the 1875–90 period and found that many kinds of crime were simply non-

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existent. In particular, burglary and robberies of both homes and businesses (except, on occasion, banks) did not occur. On the other hand, shootings did occur, although they typically involved what the citizenry considered to be "fair fights"; fighting was common, and stage and train robberies appeared to be fairly frequent occurrences. Apparently these incidents were isolated from most citizens, however, and largely caused them little or no concern (p. 196). This suggests that violence might not have been as widespread a problem as many of the authors cited above have assumed.

In addition to the problems noted above regarding the assumption of violence on the American frontier, there is a growing literature that is reaching precisely the opposite conclusion. Hollon (1974, p. x), for instance, concludes that the Western frontier "was a far more civilized, more peaceful and safer place than American society today." Violence, he claims, became a problem in the West only *after* urban development; and while Hollon did not emphasize it, we might note that such development generally included establishment of the law enforcement institutions of local governments, and frequently of state and/or federal governments. This view is supported by Prassel (1972, p. 27) who concludes that in general, the Westerner "probably enjoyed greater security in both person and property than did his contemporary in the urban centers of the East" (where, let us add, public law enforcement institutions were well established by this time). Despite finding that the West was really quite orderly, however, both Hollon (1974, p. 125) and Prassel (1972, p. 23) are at a loss to explain why, given the presence of the factors suggested by the authors cited above as causes of assumed violence.

Other historians have also begun to recognize that the frontier West was not the lawless, violent society of popular fiction or of academic assumption.[8] However, in much of this relatively recent literature, there is a general inability to explain the social order that actually was the norm. McGrath (1984, pp. 270–71) suggests that these writers, "while contending that there was relatively little violence on the frontier, nevertheless indicate that the unique frontier conditions . . . *should* have caused violence. That those conditions did not do so suggests that they might have actually promoted peacefulness—though none of the frontier-was-not-so-violent authors proposes such a connection." The conclusion proposed by McGrath, that no one has provided an explanation for the order that evolved on the frontier, is not quite accurate, however. For example, Anderson and Hill (1979, p. 10) have explained that in the American West

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> [p]rivate agencies provided the necessary basis for an orderly society in which property was protected and conflicts were resolved. These agencies often did not qualify as governments because they did not have a legal monopoly on "keeping order." They soon discovered that "warfare" was a costly way of resolving disputes and lower cost methods of settlement (arbitration, courts, etc.) resulted.

In other words, the West was not lawless, it was just "stateless." Let us briefly consider some of the "private agency" legal systems of the American West that Anderson and Hill and others have found.

A. *Land Clubs*

Private citizens began moving into the Western lands that were "owned" by the U.S. government long before this "public domain" was surveyed or available for sale. These "squatters" had no claim to the land under federal law; thus disputes over the possession and use of the land or its product could not be settled under state law even if courts had been available. "The result was the formation of 'extra-legal' organizations for protection and justice. These land clubs or claim associations . . . were found throughout the Middle West" (Anderson and Hill, 1979, p. 15).

The land clubs and claim associations each adopted their own written contracts setting out the laws that provided the means for defining and protecting property rights in land. They established procedures for registration of land claims, as well as for protection of those claims and adjudication of the internal disputes that arose. Anderson and Hill do not discuss how these organizations could have successfully generated compliance with their rules and judgments, but by now the method should be obvious. The reciprocal arrangements for protection would be maintained only if a member complied with the association's rules and its court's rulings. Anyone who refused would be ostracized. Boycott by a land club meant that an individual had no protection from aggression other than what he could provide himself.

B. *Wagon trains*

After gold was discovered in California in 1848, large numbers of people began moving across the continent in wagon trains. Members of these trains "created their own law-making and law-enforcing machinery before they started" (Billington, 1956, p. 99). In many cases the members of a wagon

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train agreed to adopt a formal contract laying out a basic set of rules that would govern them during the journey. These laws varied from train to train, but there were several general tendencies. Most trains waited until they were out of the jurisdiction of state law and then selected officers with responsibility for enforcing their own rules. The previously agreed-upon contract generally included rules regarding voting eligibility and decision rules. They also typically provided for means of amending the contract, for the banishment of law breakers from the train, and for the dissolution of jointly held property should the train split or reach its destination. More specific rules often included a procedure for organizing jury trials, laws regarding gambling, intoxication, and Sabbath breaking, and penalties for the failure to perform certain tasks like guard duty. But most important, the negotiated contracts "included a very well-accepted set of private rights especially with regard to property" (Anderson and Hill, 1979, p. 22). Respect for rules of private property was paramount.[9]

If a train's contract did not suit someone, he was free to join another, and considerable choice was often available at embarkation points. Furthermore, if a group on a train found, after departing, that the majority's interpretation of the contract was different than what they expected, the train members were free to opt out of the contract and to form a new arrangement with others who were similarly dissatisfied. In fact, most contracts formally recognized procedures for the dissolution of jointly held property in the event of a breakup (p. 19).

There were few instances of violence on the wagon trains, even when food became extremely scarce and starvation threatened. When crimes against persons or their property were committed, the judicial system as detailed in a train's contract took effect. The actual adjudication process varied, but most wagon trains specified some type of arbitration proceeding. The offender did not necessarily have to be threatened with violence from the members of the train itself, since ostracism in the form of banishment from the group would often be sufficient.

C. *Mining Camps*

Gold was discovered in California in 1848, attracting hundreds of thousands of people to the area within a very short period of time. Umbeck (1981, p. 67) explains that "[a]t the territorial and federal level there were no legal institutions restraining the behavior of miners . . . even if there had

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been such institutions, they could not have been enforced. By the end of 1848, or the beginning of 1849, the miners began forming contracts with one another to restrain their own behavior."[10] While there was some representation of federal authority in the form of military posts, the primary function of these posts apparently was to take care of Indian troubles, and they did not exercise any authority over the mining camps. But if they had, they clearly would have been enforcing a very different set of laws than those which governed the mining camps. In fact, it is questionable as to whether any state or federal government law existed that could have been applied to the camps, since as Umbeck (p. 70) explains, "from 1848 to 1850 California was without any mining law, Mexican or American. From 1850 to 1866 the only federal law made all miners trespassers on California's public mineral lands."

California state law defining rights to mineral lands could not be applied after 1850 because all the land in question belonged to the federal government. The state did pass a law in 1851 regarding mining disputes (Section 621 of the Civil Practices Act, quoted in Umbeck, p. 71), but it declared that evidence in a mining case before the state courts would include "the customs, usages, or regulations established or in force at the bar or diggings embracing such claims, and such customs, usages, and regulations, when not in conflict with the Constitution and laws of this state, shall govern the decision of the action." Thus, the state approved and agreed to enforce the miners' voluntarily achieved agreements. It may appear that this statute put the state government's power behind the private laws of the mining camps, but the fact is that these camps enforced their own laws. (Prior to 1852 the state government did not even enforce laws against murder and robbery, let alone private laws regarding illegal—from the perspective of federal law—mining claims.)

The earliest contractual arrangements that developed (primarily before 1850) involved small groups of miners. The only contractually controlled activities related to gold mining, and the agreement typically involved equal shares of all gold found. Agreements among larger groups generally were not needed, since gold deposits were so widespread and relatively few miners were in the area. This was not to last. The Harbor Master's Office in San Francisco reported the arrival of almost 40,000 people from throughout the world in 1849; the population of California was estimated at 107,000 by the end of 1849 and reached 264,000 by the end of 1852 (p. 89).

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As the size of the mining population grew and the mineral lands became relatively more scarce, contractual arrangements began to change. Rather than sharing the gold from a joint production effort, each individual was given the exclusive rights to a specific piece of land, and "[o]wnership of the gold went with the land" (p. 90). These property rights were assigned and enforced by the miners themselves. The first step in this process of contractual law and order was a "miners' meeting" for the purpose of setting up a "mining district." Such meetings were apparently organized when the need arose—that is, when minable land became scarce enough to create the potential for disputes and violent confrontations. The laws set by miners' meetings were always chosen by majority rule, but individuals who did not agree with the majority were not forced to accept its rules. They were free to move to a new location, or to opt out of the contract for reciprocal protection of rights. If a minority disagreed with a majority they could set up their own separate district. Thus, those governed by a particular set of laws actually unanimously agreed to be so governed (Anderson and Hill, 1979, p. 19).

One result of these meetings was specification of the geographic boundary of the mining district—the area over which the laws of the group would apply—and the size of the piece of land each miner could claim within that area. Claims were allocated on a first-come-first-served basis. In order to retain rights to a claim a miner was required to work it a specified number of days out of each week. Then, as long as a miner complied with these rules, the entire community of miners was obliged to defend his rights under the privately contracted set of laws of the district. "If the miner failed to comply with the terms of the contract, his claim was considered by others to be nonexclusive and open to any jumpers" (Umbeck, 1981, p. 93). Thus the reciprocal arrangements for protection were backed by ostracism.

Rights to mineral lands were not the only laws in the mining camps. Canlis (1961, p. 2), in his examination of the evolution of law enforcement in California, found that miners possessed a strong desire for organization and law. Consequently, they established and enforced a full range of private property law.

Umbeck (1981, p. 114) points out that miners generally could hire an enforcement specialist, or they could enforce their laws through group action. Some camps appointed or elected an *alcalde* or justice of the peace

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to act as arbitrator in mining disputes. In such cases, given that decisions were acceptable to the majority of miners, the arbitrator was backed by the community at large. When the majority disagreed, a new *alcalde* was appointed. Most districts, however, did not elect any arbitrator. More typically, when a dispute arose each party appointed a representative and these two picked a third party. Then the three would arbitrate the dispute. The decision was affected if acceptable to the other miners in the district. Another alternative for dispute resolution was the "miners' court." By this method, a subset of the miners in the district would be summoned when a dispute arose. A presiding officer or judge would be elected and a jury selected. The ruling of the arbitrators or miners' court was rarely disputed, but if it were, a mass meeting of the camp could be called where a dissatisfied party could plead his case and possibly get the decision reversed (Anderson and Hill, 1979, p. 20).

Now, how effective was mining camp law and law enforcement? Reid (1980, pp. 3–4) notes that "[a]pparently one need only state the proposition that America's mining frontier was lawless to prove the fact . . . [but] [c]ontemporaries who experienced that 'rampant' lawlessness in California would have been amazed by the descriptions written during the twentieth century about their society. They thought it was more law abiding than lawless." The fact is that there were very few robberies, thefts, or murders (Reid, 1980, p. 5; Canlis, 1961). Property rights apparently were very secure (Canlis, 1961).[11] Violent crimes occurred occasionally and if sufficient illegal activity arose miners would arm themselves for protection. Even so, the violence was minimal. The contractual systems of law effectively generated cooperation rather than conflict, and on those occasions when conflict arose it was, by-and-large, effectively quelled.

D. *Vigilante Justice in Response to the Failure of the Public Sector's Law Enforcement*

Local governments were established fairly rapidly in some places in the Western frontier. State and federal officials also appeared on the scene. However, in several instances the resulting law enforcement was so ineffective or so corrupt that private citizens had to reestablish law and order through vigilante organizations. Perhaps the two most well-known cases of this kind both occurred in San Francisco, so they will be briefly examined

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(although there were at least 300 historical vigilante movements in the United States and its Western territories (Brown, 1975)).[12]

By the late 1840s anyone in San Francisco accused of a crime and caught was arrested by the publicly employed sheriff and tried in the next Court of Sessions, which met every two months at the county seat. But with the swelling of San Francisco's population during the early period of the gold rush the situation began to get out of hand. The public law enforcement apparatus simply could not handle the rising tide of crime. Even those criminals who were caught frequently escaped or were released before a trial could be arranged. The city's press was urging drastic action by early 1849, but the citizens of San Francisco held back until February 1851.

On February 19, 1851, the owner of a San Francisco clothing store was robbed and beaten. The sheriff arrested two men and charged them. A large number of people gathered the next day before the city offices, demanding quick action against the accused. A committee of fourteen prominent citizens was chosen to take charge of the case. The government authorities were invited to participate but declined, although they offered no resistance and handed over the prisoners. The gathering adjourned, and the committee impaneled a jury and appointed three judges and a clerk. Two "highly regarded" lawyers were appointed to represent the prisoners. The jury, after hearing the case, voted nine guilty and three for acquittal. Some in the crowd that had gathered demanded that they be hung anyway but the committee refused. The prisoners were turned back over to the authorities. However, the impetus for a vigilante organization was now in place.

Some 3,000 citizens gathered in early June during the trial of a suspected arsonist, and during the next few days separate small groups of businessmen spontaneously began meeting and discussing the possibility of forming a "committee of vigilance." These groups did not merge for several days, however. Finally, a "selected group of responsible citizens" was called together and a committee was formed on June 10, 1851. The San Francisco *Alta* for June 13 printed a statement from the committee. It read (quoting from Valentine, 1956, p. 28) as follows:

> Whereas, It has become apparent to the citizens of San Francisco that there is no security to life and property, either under the regulations of society as it at present exists, or under the laws as now administered, therefore, the citizens whose names are hereunto attached, do unite themselves into an

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> association, for the maintenance of the peace and good order of society and the preservation of the lives and property of the citizens of San Francisco, and do bind themselves each unto the others, to do and perform every lawful act for the maintenance of law and order, and to sustain the laws when faithfully and properly administered. But we are determined that no thief, burglar, incendiary or assassin shall escape punishment either by the quibbles of the law, the insecurity of prisons, or laxity of those who PRETEND to administer justice.

This statement was followed by the committee's regulations and a list of its members.

The committee had taken its first action even before the statement in the newspaper had appeared. On the night after it had organized, John Jenkins was caught stealing a safe from an office. Two of the vigilantes assisted in the capture and took the prisoner to their headquarters instead of the sheriff's office. A trial was immediately organized, and since Jenkins had been caught in the act, he was easily convicted. The verdict was to hang Jenkins immediately (the statutory penalty under California law for grand larceny at that time was death, so the committee's punishment was consistent with the state's law).

One of the biggest sources of criminals moving into California was the British penal colonies in Australia. The vigilantes began boarding every ship that entered the port from Australia to examine the papers of anyone wishing to disembark. If someone did not have a permit to land issued by the U.S. Consul in Sydney he was not allowed to enter San Francisco. The committee paid the cost of having several sent back to Australia, while others were allowed to go on to other ports. The committee also invoked an old Mexican "ostracism" law that forbade admission to the territory of anyone previously convicted of a crime in some other country. Thus, many residents of the city were examined by the committee (each was allowed to offer evidence on his own behalf) and several were expelled from the city. Many others simply left to avoid the process.

The committee offered a $5,000 reward for the capture of anyone found guilty of arson, and committee members patrolled the streets at night to watch for fires. After these actions were taken, fires in San Francisco diminished noticeably.

"There was no question that the vigilantes had become the most powerful force in the city and had the support of most of the citizens" (p. 74).

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Apparently the only opposition was from those who saw their political power in the city slipping away. Indeed, California's Governor yielded to the pressure of local politicians and on August 20, he issued a proclamation calling on all citizens "to unite to sustain public order and tranquility, to aid the public officers in the discharge of their duty, and by all lawful means to discountenance any and every attempt to substitute the despotic control of any self-constituted association, unknown and acting in defiance of the laws, in the place of the regularly organized government of the country" (quoted in Valentine, 1956, p. 75). Then, on August 21 the vigilance committee was preparing to hang two previously tried and convicted criminals when the sheriff and a small group of police arrived at committee headquarters with a warrant of habeas corpus procured at the request of the Governor. There were sufficient numbers of vigilantes to resist but the prisoners were turned over to the sheriff's authority. No action was taken against the criminals by the public authorities, however, so two days later an organized group of thirty-six vigilantes went to the jail and removed the two prisoners. The two men were hanged seventeen minutes later. The Governor was not heard from again on the vigilante issue.

This double hanging was the last major act of the committee. The committee officially made ninety-one arrests during its 100 days of action (Stewart, 1964, p. 319). In addition to the four who were hanged, one was whipped (a not at all uncommon punishment at that time), fourteen were deported to Australia, and fourteen were informally ordered to leave California. Fifteen were handed over to public authorities, and forty-one were discharged (two others for whom no decision is recorded were apparently discharged as well). "The record is eloquent in itself. It speaks of moderation and of the attempt to render justice" (p. 319). But this "moderation" was evidently more effective than the public law enforcement system had been. Crime had declined so rapidly that for a short period, San Francisco was a city of considerable order and safety (Valentine, 1956, p. 78).

The committee announced that it was suspending action as of September 16, 1851. An executive committee was appointed to act as a "watchdog of public order" but it took only two actions, both in support of city officials. The vigilante movement had subsided almost as fast as it had begun, but the precedent had been set.

The deterrent impact of the 1851 actions by the vigilantes was short lived. By the spring of 1855, Valentine writes (p. 87), "the criminals

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were making out better than the honest men in the political atmosphere of San Francisco. A machine modeled on Tammany Hall controlled the city government and was also at war with another machine . . . for control of state officers and federal patronage.'' On April 22, 1855, the *San Francisco Herald* called for ''a return of the good and vigorous days of the vigilance committee'' (quoted in Gard, 1949, p. 161).

Between November 1855 and May 1856 more than 100 murders were committed in San Francisco (Gard, 1949, p. 165). One occurred on November 17, 1855, when a machine politician, Charles Cora, shot and killed William Richardson, the U.S. Marshall. Richardson was unarmed. Cora was arrested, but he was not very concerned. The sheriff was one of his ''cronies'' and several of the best lawyers in the city had been retained to defend him. The trial was held on January 3, 1856, but ''[t]he jury was fixed, the witnesses were rehearsed in perjury, and the proceedings were a farce. On the seventeenth the jury reported disagreement, as planned by Cora, and was discharged'' (p. 162).

On May 14, 1856, James King of William, publisher of the *Bulletin,* noted that James Casey, a city supervisor, had been a convict in Sing Sing. That evening Casey shot the publisher as King was walking home; that night the committee on vigilance was revived, as some 10,000 citizens gathered in the streets demanding action. Within two days 5,500 members were enrolled in the committee while many more sent contributions (p. 163). Casey had been arrested and was being held by the sheriff at the city jail. On May 18 some 500 vigilantes approached the jail and threatened to destroy it with cannon fire if both Casey and Cora were not turned over to the committee.

Cora went on trial on May 20 before the vigilante court for the murder of Richardson. James King died that afternoon and Casey also went on trial. On May 22 both politicians were found guilty of murder and sentenced to be hanged. But ''[t]his was no judicial farce or lynching mob'' (Valentine, 1956, p. 131). The defendants chose their own counsel and the jury, after hearing evidence from both sides, reached a unanimous verdict. The two men were hung within a few hours of King's funeral.

The committee remained active for another three months, its membership growing to 8,000 (in those three months there were two murders in San Francisco as compared to the more than 100 that took place during the previous six months). During June and July the committee put many of the city's undesirables on outbound ships. On July 29 two more

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murderers were hanged. But the 1856 vigilance committee faced a much more difficult task than simply crime control: "The committee had to deal with men like Sheriff Scannell, a former Hound; Ned McCowan, a judge; Billy Mulligan, a sheriff's deputy; Rube Maloney, a governor's handyman; and D.S. Terry, a Supreme Court Justice" (p. 171). Yet the committee, after dealing extensively in the political arena, relinquished the power it had wrested from corrupt politicians. On August 18, 1856, the committee on vigilance disbanded.

Similar stories, generally on a smaller scale, could be told of numerous other communities in the American West.[13] Generally vigilante movements involved law abiding citizens who intended to live and interact in the community for many more years, enforcing law and reestablishing order. Despite this, many historians cite vigilantism as an example of lawlessness in the West.[14] Canlis (1961, p. 13), for example, while agreeing that the San Francisco committees were well organized, orderly, and that they got rid of "some disreputable and despicable characters," nonetheless concludes that "there can never be any justification for [the vigilantes'] overall acts in a society as well organized as San Francisco was at this time." He finds it "strange indeed that the constitutional government of the time did not put down by force . . . this group which had taken the law into its own hands" (p. 13). But who was really outside the law in this case? The government's officials either failed to enforce the law as perceived by the general citizenry, as in 1851, or as in 1856, those officials were themselves in violation of the law.

The view that a vigilante movement under any and all circumstances is an example of lawlessness reflects one of the most serious flaws in the belief that law is only what public courts, legislatures, or others backed by state authority say it is. Under such a view of law, "there is no recognition that . . . a single source of legal power . . . may be so ineptly or corruptly exercised that an effective legal system is not achieved" (Fuller, 1964, p. 157). But the power of a legal authority is not absolute, even when it is in the hands of the state. As Hayek (1973, p. 92) observes, "the allegiance on which this sovereignty rests depends on the sovereign's satisfying certain expectations concerning the general character of those rules, and will vanish when this expectation is disappointed." This fact, that government law is not paramount but rather that there is some implicit constraint on power or authority (an overriding social contract), is probably not widely perceived today. Yet it is a firmly established force in American

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history. Revolutionaries chose to break from England and its law to establish their own legal system, and similar "vigilantism" has been a common occurrence ever since. Importantly, however, this does not result in lawlessness. Rather, law still prevails as private law enforcement arrangements arise.

This discussion really tells only a small part of the story of the role stateless law played in the settlement of the American West. The entire westward expansion was based to a large extent on private sector production of law and law enforcement (Valentine, 1956, p. 10). In most cases there was no alternative, since government authorities seldom were able to provide adequate law and order. But beyond that, the fact is that it worked quite well.

V. Conclusion

The primary purpose of this presentation has been to illustrate that the private sector has had a very significant historical role in the production of law and order in America. When state-backed law has been unavailable or undesirable to a particular group, private options have filled the void. Furthermore, law backed by reciprocity and enforced without the authoritarian institutions of the state still supports social interaction and promotes order today, despite widespread beliefs to the contrary. The large and growing role of commercial arbitration, for example, was alluded to above; but as the failure of the public courts becomes increasingly obvious, private arbitration or mediation is becoming increasingly vital in many other areas of law as well, ranging from consumer complaints to insurance settlements, labor disputes, and environmental issues.[15] Indeed, the 1980s have witnessed the rapid emergence of a for-profit adjudication industry (Pruitt, 1982; Koenig, 1984; Meyer, 1987; Benson, 1989b, 1990). But more generally, when we define law as "the enterprise of subjecting human conduct to the governance of rules," as does Fuller (1964, pp. 124–25), "then this enterprise is being conducted, not on two or three fronts, but on thousands. Engaged in this enterprise are those who draft and administer rules governing the internal affairs of clubs, churches, schools, labor unions, trade associations, agricultural fairs, and a hundred and one other forms of human association. . . . [T]here are in this country alone 'systems of law' numbering in the hundreds of thousands."

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Notes

1. For specific examples, see Friedman, 1979, on medieval Iceland; Peden, 1977, on medieval Ireland; Benson, 1990, on Anglo-Saxon England; Benson, 1990, 1989b, or Trakman, 1983, on the medieval Law Merchant; and Benson, 1989a, 1990, 1991, Popisil, 1971, Hoebel, 1954, Barton, 1967, and Goldsmidt, 1951, for examples of primitive legal systems.
2. This is but one definition or "theory" of law, however. For example, Friedman (1951, p. 281) proposed that "the rule of law simply means the 'existence of public order.' It means *organized government,* operating through the various instruments and channels of *legal command.* In this sense, all modern societies live under the rule of law" (emphasis added). The question highlighted below, of course, is whether state coercive power is required for effective law. Thus, in a sense, one purpose of the following analysis is to reject definitions of law which assume such a requirement.
3. A similar view of law is presented by Hayek (1967, p. 69).
4. The similarities between New England Puritan and primitive legal systems are often striking. Excommunication can be seen in the same light as the use of psychological forms of ostracism through magic among primitive societies. See Popisil, 1971, Hoebel, 1954, and Benson, 1989a.
5. Auerbach also considers government paraphernalia of enforcement to be "law" and characterizes non-state-backed law as "justice without law." This problem is not major; once it is recognized it is easily solved by simply reinterpreting Auerbach's terminology.
6. See McGrath, 1984, pp. 207–27, for a more detailed review of much of the literature discussed in this section.
7. Many Western historians, particularly those during the 1920s and 1930s, "tended to exaggerate the exploits of the gunfighters and even to romanticize and ennoble them" (McGrath, 1984, p. 264). For a sampling of such literature, see Burns, 1926, Lake, 1931, and Connelley, 1933. More recent writers have depicted gunfighters as considerably less noble, and "the number of men killed by the gunfighters is also, for the most part, considerably reduced by the revisionist historians of the 1960s" (McGrath, 1984, p. 264). For a sampling of the revisionist historians see Waters, 1960, Steckmesser, 1965, and Rosa, 1968.
8. See, for example, Perrigo (1941, pp. 41–62), who was surprised at how orderly these mining camps were. Similarly, Dykstra (1968) found Kansas cattle towns not to be especially violent or lawless. Furthermore he found little conflict between Texas cattle drives and farmers along their routes. Conflicts that arose were generally resolved without violence through the efforts and programs of cow town businessmen. See also the references discussed in more detail below.
9. See Reid, 1980, for a detailed discussion of the respect for and role of private property on the wagon trains.
10. Very similar situations also arose later in Colorado, Montana, and Idaho, where "in each case, the first to arrive were forced into a situation where they had to write the rules of the game" (Anderson and Hill, 1979, p. 18).
11. As further evidence, consider the obvious confidence that miners had in their privately produced and protected property rights system. Umbeck (1981, pp. 96–97) lists several pieces of historical evidence of this confidence:

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1. From 1849 to 1866 scarce resources were used by miners to agree upon and to enforce the contractual provisions. Any individual found guilty of a violation was punished immediately. [If the miners did not have faith in the system why would they devote time, effort and resources to promote it?]
2. By 1849 and throughout the 1850s and 1860s, it was observed that miners were devoting hundreds of thousands of dollars in developing their claims. . . . In other words, the miners behaved *as if* they had some expectation of continued use rights.
3. By 1850 most districts allowed miners to buy and sell claims and shortly thereafter this transfer of mining rights became a common occurrence. Some of the richer claims were exchanged for thousands of dollars. Had exclusive rights to the claim not existed, no one would have paid for them.
4. In 1866 the federal government passed an act allowing miners to acquire fee simple absolute in mineral lands. By 1867 only four claims had been patented and in 1869 and 1870 a total of six claims had been patented. This does not prove that miners already had property rights, but it does indicate that the additional benefits of federally recognized rights were not worth the patenting cost for most miners.
5. The mining act of 1866 legally recognized the rights of miners to the exclusive use of what was previously public land. Yet with this federal recognition and enforcement of property rights, there was no noticeable change in total gold yield. . . .
6. In his report of 1868, government agent J. Ross Browne gives a detailed report on the history and current operations of hundreds of mines in California. I can detect no systematic change in resource allocation after 1866.

When property rights are not clearly assigned, resources tend to be used up more quickly than when clearly delineated private rights exist. Since no distinguishable change in the use of California's mineral lands occurred following governmental recognition of private rights to that land, we can assume that those rights actually existed prior to the government's action.

12. The following discussion draws from Valentine, 1956, Stewart, 1964, and Gard, 1949.
13. For example, Henry Plummer was the sheriff of Bannock, Montana, in 1863. He was also the organizer of "an intricate network of bandits, agents, and hideouts in southwestern Montana" (Gard, 1949, p. 171). He led about 100 "road agents"; his deputies were horse thieves, stagecoach robbers, and murderers. Plummer himself participated in numerous robberies and was responsible for several deaths. When the citizens finally organized their vigilante justice they hanged Plummer and twenty-one of his gang in six weeks, banished several others from the area, and frightened most of the rest off. The Montana vigilante courts were like their San Francisco counterparts in that "[t]hey had good leaership and seldom acted except in extreme cases. Usually they gave the defendant an opportunity to clear himself if he could. . . . [T]he [Montana] vigilance committees were called into existence by frontier necessity. When the need for them passed, they quietly and quickly faded away" (p. 188). Also see the following note.

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14. For example, McGrath (1984, pp. 265–66) discusses vigilantism in his section "The Frontier Was Violent", despite the fact that after examining the vigilante activities in the mining camps of Aurora and Bodie California he found that "[i]n each case [the vigilante groups] were supported by a great majority of the townspeople, including the leading citizens; they were well regulated; they dealt quickly and effectively with criminal problems; they left the town in more stable and orderly conditions; and when opposition developed they disbanded. . . . The vigilance committees were organized, not because there were no established institutions of law enforcement and justice, but because those institutions had failed, in the eyes of the vigilantes, to provide justice" (pp. 255–56).
15. For details, see Benson, 1990, chap. 8.

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An Austrian Perspective on Some Leading Jacksonian Monetary Theorists

by James P. Philbin*

One of the last movements to successfully eradicate a central bank was the victory by Andrew Jackson and his Administration over the forces of Nicholas Biddle and the supporters of the Second Bank of the United States. Unfortunately, the victory by the Jacksonians did not prevent the eventual return of central and fractional-reserve banking to America. Despite this, the Jacksonian triumph is important in the history of economic thought, for it highlights a traditional American opposition to banks and monopoly privilege that began in colonial times. The Jacksonians, like their colonial predecessors, were not simple agrarian ruffians, but sophisticated economic thinkers who understood the function of money and the baneful effects of inflation.

The purpose of this paper is to discuss the monetary philosophies of some of the leading Jacksonian economic theorists, as revealed during their opposition to the Second Bank of the United States. The analysis will be conducted from an Austrian school monetary framework, because its proponents have developed the theory of money to the fullest extent and have done the most to show the destructive effects of central and fractional-reserve banking. In addition, the importance of the Jacksonian victory will be put into historical perspective.

* Department of Economics, University of Nevada, Las Vegas, NV 89154. My studies with Murray Rothbard have been the inspiration for this paper. I would also like to thank Hans-Hermann Hoppe of U.N.L.V. for helpful suggestions. Any errors are of my own making.

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An Austrian View of Central Banking

Austrian school economists have been the severest critics of inflation and central banking in the twentieth century.[1] Austrian economists have typically favored "hard" money (a commodity-backed currency), the elimination of artificial bank credit, and the abolition of central banking. Writers in the Austrian tradition view the primary function of money as a medium of exchange, one that originates on the market as a useful commodity. Once a commodity has been established as money, there is no need to increase its supply; hence any supply of money is "optimal" for the facilitation of exchange.[2] An artificial increase in the supply of money—either through debasement or by bank credit expansion—confers no social benefit. Inflation can only result in increased prices, dilution of the purchasing power of the monetary unit, and the redistribution of wealth.[3] Inflation of the money supply, especially in the form of bank credit, will necessarily lead to a temporary boom through malinvestment in the capital goods industries, and a resultant bust and depression.[4]

Fractional-reserve banking—the issuance of bank notes beyond the amount of specie banks hold in reserve—is considered by some Austrian economists to be fraudulent, a form of embezzlement that when practiced should be prosecuted as such.[5] Governments, though, have traditionally allowed banks to continue engaging in fractional-reserve banking despite failure to meet their obligations (as in a "bank run"), and suspension of specie payments has had an infamous history in both the U.S. and Britain.[6] Central banking, the most serious form of government intervention in banking, is opposed on the grounds that both the central bank and its member banks can engage in credit expansion without the market checks that exist in a system of free, 100 percent reserve banking.[7] Through its monopoly privilege of note issuance the central bank can allow member banks to expand the money supply without fear of runs, because it can always print additional notes to cover the obligations of the inflating banks.

The preceding brief exposition of Austrian objections to inflation and fractional-reserve banking is meant to provide a framework for the analysis of some of the chief Jacksonian monetary theorists and their opposition to the Second Bank of the United States. Hopefully this paper will show that the leading Jacksonians expressed similar concerns to those held by later Austrian school theorists.

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William M. Gouge

The leading Jacksonian hard-money theorist was William M. Gouge. Gouge was an advisor to Democratic leaders and Presidents and a financial editor of a number of journals. He was a staunch opponent of paper money and privileges for the banking system. He was also one of the principal architects in the framing of the Independent Treasury System that replaced the Second Bank of the United States.[8]

Like Menger, Gouge pointed out that money receives its value and importance as a medium of exchange from the market, rather than from government decree or a social contract. "Some fancy that it is the authority of government that gives money its value. But the true value of money, as measured by the amount of goods for which it will honestly exchange, cannot be affected by edicts of princes or acts of Parliament." He recognized that the state could, and did, have a pernicious effect on money through debasement: "Monarchs and Ministers may alter the weight of coins, or lessen their purity." He also correctly reasoned that government could not create value in money by fiat: "[T]hey cannot make a coin containing an half of an ounce of pure silver, worth as much as a coin containing an ounce."[9]

One of the consistent themes in Gouge's writings is his distain for bank-issued paper money not backed by specie: "[N]o legislative enactments can afford an adequate remedy for the evils which flow from incorporated paper money Banks. The system is, to use the language of the lawyers, *malum per se*—or a thing which is evil in its nature."[10] Furthermore, Gouge's discussion of the privileged position of the country's banking system demonstrates that he clearly understood Gresham's dictum that money coercively overvalued by the state drives "good" money out of circulation: "They [the banks] drive away what may be called the *natural* money of the country, and substitute for it something which differs from this natural money in both the *nature* of its value, and the *causes* of its value."[11]

On the relationship between the quantity of bank notes and prices, Gouge observed that "[a]n increase or decrease of bank notes in the United States, has the same effect on prices, that an increase of solid money has on prices in Spain or Switzerland. Increase the amount of bank notes, and, *other things being the same,* prices will rise. Diminish the amount of bank notes,

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and, *other things being the same,* prices will fall.''[12] Moreover, he realized that an increase in the supply of notes would not increase wealth: ''Nothing is gained by this forced extension of the credit system. . . . If banks at any time make money more plentiful than it would be if only gold and silver circulated, they diminish its value in increasing its quantity. The valuation, or relative estimation of things is thereby enhanced, but not an atom is added to the wealth of the community.''[13]

He perceptively saw what an increase in the supply of paper money would do to an economy. Inflationary bank credit would cause an artificial boom—he labeled it ''speculation''—and then a painful bust. ''The banks, by expanding their issues, give ailment to the wild spirit of speculation when it begins; and by their contractions, they aggravate the evils of the natural reaction.'' Under a hard-money commodity standard, however, booms and busts would cease to be a nagging reoccuring problem.[14]

As the Scholastic tradition and later Cantillon had shown, an increase in the money supply has redistributive effects. Gouge likewise recognized that the first recipients of the ''new'' money receive a transfer from the later receivers:

> If the superior credit the banks enjoy, grew out of the natural order of things, it would not be a subject of complaint. But the banks owe their credit to their charters—to special acts of legislation in their favor, and to their notes being receivable in payment of dues to government. The kind of credit which is created for them by law, being equipollent with cash in the market, enables them to transfer an equal amount of substantial wealth from the productive classes to themselves, giving the productive classes only representatives of credit, or evidences of debt, in return for the substantial wealth which they part with.[15]

Gouge's position in the titanic struggle to recharter the Second Bank of the United States was based on this understanding of central banking. The pro-Bank forces argued that the Bank of the United States should be rechartered on the grounds that it would act as a check on the note issuance of state banks. T. F. Gordan, a contemporary proponent of the Second Bank, admitted that the state banks were inherently inflationary and had greatly expanded their note issue beyond the gold they held in reserve: ''There is a constant tendency in the state banks to overissue.'' He also saw that these state banks would be insolvent if their customers were to demand their gold: ''Thus, it is apparent that the circulation of the state

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banks is at least seven times greater than their specie, and that, consequently, they would be wholly unable to withstand any run, which might drain them; and would be compelled to contract their issues. . . .''[16]

Gordan believed that the Second Bank would be a remedy to this problem. He saw the central bank as a restraining influence on note issue by the state banks, making an analogy with the sun's role in the solar system. ''It is supposed, justly supposed, that the presence of the Bank of the United States, like the sun in the system, vivifies, regulates, and preserves the subordinate banks. . . .''[17]

Gouge's analysis of central banking, and the Bank of the United States in particular, was less sanguine than Gordan's. He maintained that the Second Bank would be just as inflationary, and just as dangerous to economic prosperity, as the state banks; it was no solution to the problem. ''Neither is the establishment of a United States paper-money incorporated bank, the 'necessary and proper,' or 'natural and appropriate' way of correcting the evils occasioned by the state banks. A national bank, resting on the same principles as the state banks, must produce similar evils. It must 'contract' and 'expand' as well as they.''[18]

Condy Raguet

In 1829 Gouge agreed to support another hard-money Jacksonian theorist, Condy Raguet, who headed a workingmen's committee to limit the issuance of the number of bank charters.[19] A member of the American Philosophical Association and president of Philadelphia's Chamber of Commerce, Raguet had spent many years as a student of money and banking. He saw how Europe's and especially England's experience with bank credit had damaged their respective economies.[20] In his *Treatise on Currency and Banking*, published in 1840, he delightfully related that because of Gibraltar's and Havana's pure metallic media of exchange, their economies had not suffered through periodic booms and busts. He was particularly happy to learn that a movement to erect a bank in Gibraltar was crushed: ''[S]everal attempts to establish a bank there were put down by almost common consent.''[21]

Like Gouge, Raguet identified a fundamental difference between capital (savings) and bank credit: The former was legitimate and necessary for an increase in the standard of living, while the latter was a fictitious crea-

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tion of the banking system and could only lead to economic ruin.[22] Hence he warned against the possibility that the entire industrialized world would adopt a paper money standard that would permit unchecked worldwide inflation. An international gold standard would limit any one country's inflation by the outflow of gold; if gold were eliminated internatinally and replaced by paper there would be little restraint on unified global credit expansion.[23] By admonishing against such a possibility, Raguet showed not only that he was a perceptive prognosticator, but also that he understood the Hume-Ricardo price-specie flow mechanism.[24]

To prohibit banks from fractional-reserve practices Raguet proposed "strict convertibility." He called on both the public and the government to force the banks to redeem their notes immediately on demand—it was the public's duty to be forceful and vigilant when redeeming their notes. Like Rothbard and other Austrians, Raguet urged the populace to be watchful of bank practices:

> The duties which the public have to perform, as a check upon this perpetual tendency to overissue, are incumbent on every citizen; and he who withholds his cooperation, when he has a motive to act, becomes a participator in the wrong. They are simply, for every man who wishes to convert bank notes or deposits into coin . . . to make his demand without being influenced by fear, favor, or affection, or through any false or mistaken delicacy towards the directors of banks, or their debtors who might in consequence thereof be called upon for an earlier reimbursement.[25]

Raguet called on the government to suspend or cancel the charters of banks which did not immediately convert their notes into specie.[26] Swift convertibility of paper notes into specie, he believed, would prevent the dreaded boom-bust cycle. "With such convertibility as this would accomplish, we should run comparatively very little risk of expansions and their consequent contractions. . . . The overtrading of each particular bank would be checked . . . and if recklessness should characterize the conduct of one, or a dozen, or 100 banks, it or they would simply fail, like individual traders, and make an assignment of their property, without producing the catastrophe of a general suspension of specie payments."[27]

Raguet's monetary acumen proved to be far superior to that of his more celebrated British counterparts. Rothbard points out that Raguet was the first to see that demand deposits were just as much a part of the money supply as were bank notes. The British currency school, by contrast,

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tragically neglected to include demand deposits as a component of the money supply, and that omission made it easier for the Bank of England along with the British and Scottish country banks to inflate the money supply by increasing demand deposit accounts.[28] Raguet's superb insight further supports the contention that American monetary theorists not only equalled, but surpassed, their British rivals. This enabled American hard-money forces to combat more effectively the establishment of central banking.

John Taylor

Although the bank war culminated nearly ten years after his death, John Taylor of Caroline can still be placed in the Jacksonian ambit. Born into a wealthy Virginian family in 1753, Taylor would become a successful lawyer and rich planter. He served in the Continental army and was elected to both the Virginia legislature and to the U.S. Senate.[29] Taylor had opposed Hamilton's original proposal of a national bank and had argued against its rechartering in 1816. He correctly saw that if the bank were instituted it would be used to buy the federal government's debt, which happened to be held by many of the bank's supporters.[30] Moreover, Taylor raised objections to the constitutionality of the bank.

Taylor realized the threat to liberty posed by an alliance between the banks and the government. He disparaged the privileges that legislatures had bestowed on the banks by allowing them to suspend specie payments and still stay in operation. He labeled such practice as fraud: "[U]nder our mild policy . . . [the banks'] crimes may possibly be numbered, but no figures can record their punishments, because they are never punished." The Virginia libertarian understood that were it not for the government's intervention the banks' inflationary practices would eventually be discovered. "In a free country, the detection, sooner or later, is inevitable . . . . Exposed to the scrutinizing eye of liberty, a detection of fraud will come at last."[31]

In a passage from his book on constitutional government Taylor asked a series of rhetorical questions on whether a republican form of government can exist when banks have so much power. He noted that governments have always used unscrupulous methods to acquire additional wealth: "Governments have repeatedly aggrandized themselves and enriched the initiated, under intricate and plausible schemes for enriching the nation;

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and labor is induced cheerfully to exchange its earnings, for dogma or a charm."[32] He also expressed little concern for the country's currency if the national bank were eliminated: "The free industry of the people, if suffered by the government to operate fairly upon the commercial world, will rapidly supply us with a better currency than the involving, fluctuating, vanishing, counterfeited currency of [bank] corporations."[33]

Like some of the British currency school adherents, Taylor gave some consideration to the idea that the national government, rather than a central bank, should have the task of regulating the currency. He regarded such an option the "wisest" of any proposed, but insisted that if it were based on a paper currency he would oppose it. "[T]hough I believe that the best experimental paper currency was that before the revolution; and that an imitation of it would be our wisest course, if we must have a paper currency, which I do not believe; I do not enter into the subject, because it does not fall within my plan."[34]

John Randolph

A fellow Virginian and radical libertarian equally hostile to central banking was John Randolph of Roanoke. Randolph and Taylor represented the "Old Republican" branch of the Democratic-Republican Party, which by the time of Jefferson's second term was in open revolt against his policies. This group opposed any government subsidy of business, especially protective tariffs, and they condemned the war with Great Britain, warning against the then-growing neo-mercantilism that would later become known as the American System.[35] Naturally, the Bank of the United States with its monopoly position came under attack from Randolph and his cohorts. He argued vehemently in Congress against its proposed recharter in 1816.[36]

Randolph despised state banks as well, equating them in one speech to bordellos. Like Taylor, Randolph questioned the constitutionality of such institutions, and he evoked the memory of the British East India Company and its inflationary bust that had left such a vivid impression on the Founding Fathers.[37]

Even though James Madison had recently died, Randolph did not hesitate to blame him for the economic distress that the First Bank had caused: "I am sorry to say, because I should be the last man in the world to disturb the repose of a venerable man . . . all the difficulties under which we have labored, and now labor on this subject have grown out of a fatal admission by one of the late Presidents of the United States . . . an admission

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which gave a sanction to the principle that this government had the power to charter the present colossal bank of the United States.''[38]

Thomas Hart Benton

Another opponent of the Bank of the United States was Missouri senator Thomas Hart Benton. Like many other Jacksonians, his opposition began during the Panic of 1819. Benton's involvement with the failure then of the Bank of Missouri transformed him into an ultra hard-money advocate for the rest of his political career.[39]

Benton's consistent commitment to hard money did not just apply during times of prosperity. During the Panic of 1837 he held fast to his position, despite calls for the suspension of specie and government relief of debtors; the result was Missouri's relative prosperity during the Panic. He commented that his state's retention of the gold standard had ''given us solid, permanent, and *diffused* wealth, with happiness and tranquility.'' Benton's biographer William N. Chambers credits his influence in outlawing ''wildcat'' banks for enabling Missouri to prosper during the economic downturn.[40]

Nationally, Benton planned to pursue policy similar to the one he so successfully employed in his home state. He refused to entertain any ideas of reconstituting a central bank or suspending specie payments as a solution to the 1837 panic. Instead, he continued to call vehemently for hard money: ''Throughout the long debates, Benton's voice 'resounded' again and again in dogged defense of the agrarian, hard-moneyed position.''[41]

As for the cry for state relief mounted, Benton countered with a proposal for an Independent Treasury in which the government would deposit its own funds, with the primary purpose of separating government from banking. Throughout Van Buren's term Benton continued to push for passage of an Independent Treasury in Congress. Unfortunately, Benton and his forces were ultimately defeated by a combination of Whigs and moderate Democrats.

As Randolph had done, Benton blamed Madison's administration for chartering the First Bank. During his criticism of the former President, the Missouri senator made it perfectly clear what type of medium of exchange he desired: ''Gold and silver is the best currency for a republic; it suits the men of middle property and the working people.''[42] Yet statements like this have frequently been misconstrued by historians, due to their faulty understanding of monetary economics. Chambers, for

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example, misinterprets Benton's above statement on gold or silver as meaning that "[t]o many self-styled followers of Jefferson, 'democracy' had come to mean only *political* equality. . . . In 1830 and 1831, however, the question of relative *economic* and *social* equality was brought to the fore again."[43] To label Benton and other Jacksonians as economic egalitarians is not only incorrect, it also glosses over their sophisticated monetary insights. Their criticisms were directed at wealth achieved through state aid, not wealth per se. To compound the error, Chambers includes Jackson's veto of the Maysville Road Bill with the abolition of the Second Bank as indication of the Jacksonians desire for equality.[44] Jackson's veto, however, was fully in line with the laissez-faire Democrats' antipathy for government-sponsored internal improvements, and not a display of egalitarianism.

Martin Van Buren

Despite being plagued initially by the Panic of 1837 and widespread demand for government intervention, Martin Van Buren pursued a courageous hard-money program throughout his Presidency. Van Buren demonstrated libertarian leanings in his response to calls for government relief in the form of a national paper currency. He responded to such pleas by evoking the traditional Jeffersonian position on limited government: "All communities are apt to look to government for too much." The purpose of government was to protect property and refrain from intervention.[45]

Van Buren's plan for coping with financial difficulties was to completely separate banking and government. He believed that the idea of an Independent Treasury would remedy the excessive issue of notes by banks holding federal funds. Banks were using the federal deposits as a base to "pyramid" and expand their credit issues. Van Buren reasoned that if the funds were kept in the Treasury, the ability of banks to expand credit would be reduced.[46]

Facing a severe economic downturn and possible defeat in the upcoming election, Van Buren demonstrated that he was a principled follower of hard money. In 1839 he proposed a number of remedies to combat the financial panic: One was the proposal of a federal bankruptcy law that would immediately close any state bank unable to redeem its notes in specie on demand; the second was a law to ban notes of small denominations from circulation; in addition, and in accordance with later Austrian policy

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recommendations for curing depressions, he called for government expenditures to be drastically slashed.[47] These policy proposals were announced despite the gloomy economic climate and an impending election. It is rare for a politician to undertake such a course of action, and it eminently shows the commitment that Jacksonians had for sound money.

Conclusion

This paper has attempted to sketch the monetary position of some leading Jacksonians. From these theorists' pronouncements on money, banking, and government, certain conclusions can be advanced. First, the Jacksonians understood monetary economics better than most historians have acknowledged. They knew the function of money in a market economy and saw the dangers of inflation and fractional-reserve banking. Many of their views would be later seen in a more systematic and refined manner among the works of Austrian economists. Second, unlike the British currency school, the Jacksonians realized the destructive possibility of a central bank in generating an unchecked price inflation. Finally, most of these thinkers consistently advocated a medium based on gold or silver to avoid the unpleasant consequences of a boom-and-bust cycle.

Sadly, the Jacksonian destruction of the Second Bank of the United States was one of the last major triumphs of the gold-standard advocates over those of central banking. Throughout the nineteenth century, inflationists (Whigs and Republicans) whittled away at the gold standard and reestablished a central bank in 1913. Nonetheless the elimination of the Second Bank was important, for it paved the way for the hard-money system that was the cornerstone for the unprecedented growth and prosperity of nineteenth-century America.

Notes

1. For a selection of some of the most significant of the modern Austrian economists' contributions to monetary theory and hostility to inflation, see Ludwig von Mises, *The Theory of Money and Credit* (London: Jonathan Cape, 1934; reprinted, Indianapolis, Ind.: Liberty*Classics*, 1981); idem, *On the Manipulation of Money and Credit*, (Dobbs Ferry, N.Y.: Free Market Books, 1978); idem, *Human Action: A Treatise on Economics*, third revised edition (Chicago: Henry Regnery, 1966); Murray N. Rothbard, *Man, Economy, and State: A Treatise on Economic Principles*, 2

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vols. (Los Angeles: Nash, 1970); idem, *America's Great Depression* (Kansas City: Sheed & Ward, 1963); idem, *What Has Government Done To Our Money?* (Novato, California: Libertarian Publishers, 1981); idem, *The Case For A 100 Percent Gold Dollar* (Meridan, Conn.: Cobden Press, 1984); idem, *The Mystery of Banking* (New York: Richardson & Synder, 1983).

2. Rothbard, *What Has Government Done To Our Money?* pp. 10–14.
3. Mises, *Theory Of Money and Credit*, pp. 160–68.
4. Rothbard, *America's Great Depression*, pp. 11–25.
5. Rothbard, *The Case For A 100 Percent Gold Dollar*, pp. 20–27.
6. Rothbard, *What Has Government Done To Our Money?* pp. 36–38.
7. Rothbard, *Mystery of Banking*, pp. 127–40.
8. For a biographical sketch of Gouge see Joseph Dorfman, "William M. Gouge and the Formation of Orthodox American Monetary Policy," in Gouge's *A Short History of Paper Money and Banking in the United States, to which is Prefixed an Inquiry into the Principles of the System* (Philadelphia: T.W. Ustick, 1833; reprinted, New York: Augustus M. Kelly, 1968), pp. 5–26.
9. Gouge, *Short History of Paper Money and Banking*, p. 8.
10. *Ibid.*, p. 52.
11. *Ibid.*, p. 53.
12. *Ibid.*, p. 55.
13. *Ibid.*, pp. 40 and 45.
14. *Ibid.*, pp. 63–64.
15. *Ibid.*, p. 85.
16. T.F. Gordan, *The War on the Bank of the United States* (Philadelphia: Key & Biddle, 1834; reprinted, New York: Augustus M. Kelly, 1968), pp. 83–84.
17. *Ibid.*, p. 84.
18. Gouge, *Short History of Paper Money and Banking*, p. 112.
19. Bray Hammond, *Banks and Politics in America: From the Revolution to the Civil War* (Princeton, N.J.: Princeton University Press, 1957), p. 343.
20. Condy Raguet, *A Treatise on Currency and Banking* (Philadelphia: Grigg & Elliot, 1840; reprinted, New York: Augustus M. Kelley, 1966), p. x.
21. *Ibid.*, p. 37.
22. *Ibid.*, p. 53.
23. *Ibid.*, pp. 83–84.
24. Rothbard, *Mystery of Banking*, p. 122.
25. Raguet, *A Treatise on Currency and Banking*, pp. 101–02.
26. *Ibid.*, p. 102.
27. *Ibid.*, p. 103.
28. Rothbard, *Mystery of Banking*, pp. 2–3.
29. M. E. Bradford, "A Virginian Cato: John Taylor of Caroline and the Agrarian Republic," in *Arator, being a Series of Agricultural Essays, Practical and Political, in Sixty-Four Numbers* (Indianapolis, Ind.: Liberty*Classics*, 1977), pp. 12–14.
30. *Ibid.*, p. 22.
31. John Taylor, *Construction Construed and Constitutions Vindicated* (Richmond, Va.: Shepherd & Polland, 1820; reprinted, New York: Da Capo Press, 1970), pp. 182–83.

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32. *Ibid.*, p. 183–85.
33. *Ibid.*, p. 337.
34. *Ibid.*, p. 338.
35. Russell Kirk, *Randolph of Roanoke: A Study in Conservative Thought* (Chicago: University of Chicago Press, 1951), p. 100.
36. *Ibid.*, pp. 104–05.
37. William Cabell Bruce, *John Randolph of Roanoke 1773–1833*, 2 vols. (New York: Octagon Books, 1970), vol. 1, pp. 430–32.
38. *Ibid.*, p. 433.
39. William Nisbet Chambers, *Old Bullion Benton: Senator from the New West* (Boston: Little, Brown and Company, 1956), pp. 85–87.
40. *Ibid.*, pp. 223–24.
41. *Ibid.*, p. 224.
42. *Ibid.*, pp. 173 and 175.
43. *Ibid.*, p. 175.
44. *Ibid.*
45. Major L. Wilson, *The Presidency of Martin Van Buren* (Lawrence, Kans.: University Press of Kansas, 1984), pp. 72–73.
46. *Ibid.*
47. *Ibid.*, p. 136.

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Levin on Feminism and Freedom

by Walter Block*

Michael Levin's *Feminism and Freedom*[1] is the work of a supremely courageous individual. Women's liberation has so permeated the universities that any attack on this philosophy is bound to create personal difficulties for a male author.

Professor Levin denies the feminist thesis that men and women are exactly alike except for reproduction. On the face of it, this might not sound like much; indeed, it can only be considered the merest of common sense. However, an entire public policy agenda has been erected on either the denial, or neglect, of this elementary insight. Levin shows that the feminist program is entirely incompatible with freedom. Equal pay, affirmative action, non-discrimination statutes, women's studies departments, set asides, quotas, equal opportunity laws, anti-harassment enactments—indeed, a whole panoply of modern public policy—are all intolerable attacks on human liberty. Consider just the charge of sexism, the veritable tip of the iceberg: Levin gives the example of a male faculty member who asks a female graduate student for a date, or a foreman who invites one of his employees for coffee, and is refused. The professor or foreman takes the rejection with good grace, and does not in any way retaliate. Nevertheless, his mere invitation can subject him to charges of harassment. This has a chilling effect, to say the least, on our rights of free speech—to say nothing of normal social interaction.

I like this book, and very much so. I recommend it highly to all those who are concerned with human liberty and with the feminist attack on these principles.[2] As in the nature of such things, however, I have found numerous details with which I can object. None of them invalidates his main thesis,

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but these small points will certainly be of interest to libertarians. Most of my disagreement stems from the fact that Levin is a conservative, not a libertarian, and while he is innovative and brilliant in coming to grips with the feminist attack on freedom, his refutations open him up to violations of liberty on numerous other grounds. So without any further ado, I consider those parts of the Levin volume with which I disagree.

1. The author states that "[p]rivate discrimination against women has been illegal since 1964," in a context which implies he favors such legislation.[3] Certainly, he does not criticize this state of affairs, while castigating almost everything else favored by feminists. From this we can deduce that he is not opposed. If so, however, this is clearly counter to the dictates of morality, to say nothing of common sense. For surely the basic right of free association allows us the privilege of not only interacting with those we choose to, but also refusing to associate with those we wish to avoid. Yet if private discrimination against women were legally prohibited, then organizations such as the Boy Scouts, Rotary, Lions, Moose, and Elks Clubs, and the Chamber of Commerce, to say nothing of the dozens of other men's only luncheon, supper, and athletic clubs, would be outlawed. And what of male homosexuals? Their discrimination against women would have to be brought to an abrupt halt, to the utter denigration of their liberties. Strictly speaking, disallowing private discrimination against women would also rule out the possibility of separate men's washrooms.

In addition, if private discrimination against men were by the same token also disallowed, then this would mean the end of women's only groups, such as the Y.W.C.A., feminist consciousness-raising groups, lesbian organizations, and large parts of the women's liberation movement itself. (I'm tempted to say: Hey, maybe this isn't such a bad idea after all; except for the fact that women, and men too, have a *right* to assemble together with those of their choice, and to exclude all others.)

Similarly, our author lists segregation, along with slavery and the lynch mob as examples of wrongs perpetrated upon blacks.[4] According to libertarian principles, however, people have a right to live in segregated housing (i.e., to refuse to sell to members of certain racial or ethnic groups), but certainly not to invade others as in the case of enslavement or lynching. Suppose we were to list the three "crimes" of enslavement, segregation, and lynching, and then to ask the man in the street "Which one does not belong with the others?" Is there any doubt he would pick segregation?

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2. Levin accepts without demur the claim that "getting everyone to drive on the same side of the road [is] a paradigm coordination problem solved by state action."[5] But surely private road owners were able to get everyone to drive on the same side of the road when property rights in highways were allowed, and would be able to do so again should we ever move toward road privatization again. And not only could private enterprise get everyone to drive on the same side of the road, the government cannot—at least to judge by our stupendous traffic fatality rate.[6]

3. While Levin is sound on the question of forced equality for women, he leaves something to be desired in regard to what I would consider the identical issue of forced equality for racial minorities. He states that "unlike the case for racial quotas, which is merely unsound, the case for gender quotas is an intellectual scandal." In his view, there are relevant differences between the two. At one juncture he points to the innate differences between the sexes. But are there no innate differences between the races? And even if it could be shown that there are innate differences between the sexes, but not the races, it would still not follow that this is a relevant *moral* distinction. The libertarian non-aggression principle, for example, would still apply in both cases.[7]

Elsewhere he claims it as a relevant difference that blacks have been more heavily victimized by violence (slavery, segregation, lynching) than have women.[8] We have already dealt with the segregation issue; but what of the feminist rejoinder that women have been victimized by rape? To this Levin cavalierly notes that "there is no evidence that rape adversely affects female acquisition of job skills." One might think the reason there is no evidence is that the causal chain is so obvious it never occurred to anyone to go out and *find* evidence on this matter. Rape is so savage and bestial an attack that it cannot help but have a negative impact on all aspects of life. For that matter, is there any evidence on the fact that lynching or slavery "adversely affects black acquisition of job skills?" Furthermore, there are no blacks being lynched or enslaved *today*, while women, unfortunately, are still being raped.[9]

In any case, what is the *relevance* of past victimization to present rights? Surely, we all have an equal right not to be aggressed against at present, and no other rights than that, regardless of the amount of victimization suffered by our forebears in the past.

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4. Although Levin does not go so far as to advocate preventive incarceration for all eighteen-year-old males in order to reduce the crime rate (indeed, he repudiates this), he does claim the legitimacy of preventative coercion on the part of the state "only in emergencies."[10] The forces of law and order, he claims, need not wait until an actual crime is committed; the threat thereof, or the opening stages (like the pointing of a gun), will suffice.[11] But the libertarian moral code legitimizes force only as a reaction to prior force—one may not assault another who has engaged in no coercive activities simply on the assumption that he may do so later. Preventive coercion is thus never justified, emergency or not.

5. Levin objects to governmentally enforced quotas on the ground that "rights orginally promised on the basis of seniority are subordinated to the need to 'preserve the gains' of affirmative action."[12] But these seniority "rights" were gained through an illegitimate process of their own; that is, through coercive unionism.[13] It is an interesting speculative venture to choose between two such illegitimate rights, but it is ultimately meaningless. Suppose you had to judge which of two persons was the rightful owner of a wallet. One gave as his reason that he is 5′8″ tall and wears a red coat, while the other justified his claim on the ground that he weighs 160 lbs. and wears a blue coat. All you could do is throw up your hands in dismay.

6. States Levin: "The common law will not dispossess the current holders of land that has been transferred in good faith for a number of generations, despite proof from a claimant that the land was stolen from his ancestors; too much honest labor is now part of the land."[14] This is a particularly infuriating argument, because the author does not even openly agree with the assessment; instead, he hides behind a declarative sentence concerning the common law. We are forced to deduce from the fact that he does not object to it—that he indeed cites it to buttress his own argument—that he actually favors it.

But there is no statute of limitations on justice.[15] If my grandfather stole your grandfather's watch, it is unjust if I am allowed to keep it, no matter how many times my father may have polished it and otherwise cared for it. It is stolen property which never should have passed from my grandfather to my father, or from him to me. And the same analysis applies to land, or any other good.

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7. Not content with attacking the feminists, Levin also launches into a critique of right-wing opponents of women's liberation—for being insufficiently radical. This is all well and good; anyone who publishes anything, on whatever side, must bear the scrutiny of all subsequent writers. Furthermore, most of his shots hit their mark. But there are several places where he is off target. First, Levin upbraids Thomas Sowell (without directly quoting him), for what he calls Sowell's implicit acceptance of the view "that quotas 'work' if they increase the number of blacks and women in high-level positions." But all Sowell says, according to Levin, is that "affirmative action does not work because it rewards well-credentialed blacks and women whom firms are eager to hire without helping poorly-credentialed blacks."[16] By this quote, though, Sowell does not necessarily indicate that he has accepted the feminist premise. All he is doing is claiming that even given the viability of this feminist premise, affirmative action is still not an effective means toward that end.[17] In other words, Sowell finds that the women's liberation movement is acting inconsistently with its own goal in championing affirmative action. I find nothing wrong with that.

Second, Levin reprimands Carl Hoffman (again, without directly quoting him) for accepting "wholly environmental explanations of sex differences in economic behavior." Specifically, Levin complains that Hoffman "objects to comparable worth because it penalizes employers who 'had nothing to do with producing . . . female inhibition.'"[18] But why is this equivalent to accepting a wholly environmental explanation of sex differences? All Hoffman [19] is saying is that employers are punished, even though they are entirely innocent of *whatever it is* that is causing female inhibition. As I read this, it is entirely consistent with the denial of a wholly environmental explanation.

Third, Levin admonishes Ma Block's favorite and only son. Once again his usual scholarly scrupulousness deserts him, and he fails to quote me directly. What is his complaint? "Walter Block explains sex differences in economic characteristics in terms of a 'fear of success' which besets girls in high school."[20] In fact, however, I was not offering this as an explanation of my own, but rather citing a whole host of feminist writers to this effect.[21] In any case, why is this necessarily equivalent to a wholly environmental explanation? Couldn't it be that this fear of success stems from biological antecedents?

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8. The author of *Feminism and Freedom* accepts without criticism the myth that government can be productive, in the ordinary economic sense.[22] This is unremarkable in a conservative; no better can be expected. However, he does take the view that "people should not be forced to finance what they abhor";[23] from this one might expect him to reason that if people are forced to do so, the result cannot be productive from their point of view (otherwise they would have financed the projects voluntarily), and that since government revenues are derived through force, the state cannot be productive. Alas, the very opposite of this conclusion was drawn by him.

9. Levin opines that as long as all large firms are forced to engage in affirmative action, none need fear loss of profits. General Motors need not worry about transmitting costs to the consumer in the form of higher prices as long as Ford and Chrysler must do the same. But what about small firms, not covered by this pernicious legislation? Can they not take market share away from all the large but encumbered firms?

10. Libertarians hold that discrimination should be allowed, on any basis, in the private sector, but not at all, on any basis, in the public sector. The reasoning is that if people are forced to pay taxes without discrimination, then they should be allowed to seize whatever benefits they see in government operation, also without discrimination. But the types of discrimination envisaged in this principle include far more than what is usually supposed. In addition to the usual race, sex, ethnicity, etc., it also includes everything else conceivable: strength, agility, intelligence, endurance, speed, and so on. The point is that if both the weak and the strong are forced to support the state, on a non-discriminatory basis, then the state must deal with each in the same manner.

Consider the case of the fireman with which Levin begins his book. By establishing physical requirements for fire fighters the government is discriminating on behalf of the strong and agile—those, in other words, who are best suited to fighting fires and rescuing fire victims. This is entirely illegitimate, however, in that the state is discriminating against the elderly, those in wheelchairs, the weak, the blind, etc.; in a word, against all those unable to function adequately as firemen. Naturally, of course, without such discrimination public-sector fire protection would be fatally compromised. But that is of no concern at all to the libertarian. Indeed, this

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state of affairs would be positively welcomed! For it would undermine the present nationalization of this vital service, and tend to place it back in private hands, where it belongs.

11. The same goes for education, despite Levin's chapters 7 through 9, where he deals with such matters. How is it warranted for the state to hold entrance exams for public universities, when these discriminate in favor of the most intellectually able? Ignorant and stupid people also pay the taxes used for these institutions of learning. They deserve representation at the finest public universities, and on a proportional basis; or at least on one that does not discriminate on any basis whatsoever. Of course, all entrance exams have to discriminate on *some* basis, so the argument in effect calls for the cessation of all entrance exams for public universities. Remember, we are searching for a moral way for goods and services that have been taken from people against their will to be ethically returned to them. And surely it cannot be on any basis irrelevant to the manner in which such things were taken.

Levin, in sharp contrast, avers that government is justified in supplying public education, provided that it teaches children good citizenship and steers clear of controversy. He does so despite his recognition that "public education forces parents to send their children to . . . school," that people obviously abhor being forced to do things against their will, and that "people should not be forced to finance what they abhor."[24] Even his restriction upon the state not to engage in controversy is logically flawed. He holds that "the state can legitimately press literacy, numeracy, and basic factual information on children" and that "the public schools could teach industriousness and honesty, but they could not take sides in controversies.[25] But not all taxpayers favor honesty; some are thieves. Not all favor industriousness; some are lazy. Not all favor literacy; some are illiterate.[26]

12. Our author favors wage control legislation. He says that "the question . . . [of] whether women . . . receive the same pay as men for the same work . . . was settled in 1963 when the Equal Pay Act made it illegal to pay a woman less than a man for the same job."[27] Well, this may well be settled in the minds of some advocates of government intervention, but there are still those of us who yearn for a world of economic freedom,

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one of contract, not status. If an employer wishes to pay a man twice as much for doing the same exact work as a woman, that is his natural right. We could interpret the extra pay as a gift; or we could determine that the jobs are not really exactly equal, if only because the employer is more comfortable with the man in his employ than with the woman. But these scenarios are beside the point. The bottom line is that in a free society there should be no restrictions whatsoever on the free contractual rights of consenting adults. If an employer can find a woman willing to accept half the salary of a man for the same job, it is their right to agree to a wage contract which stipulates this.[28]

13. Perhaps Levin's most serious breach of the libertarian legal code involves his defense of conscription. In his view "if the all-volunteer force is unable to attract enough men, an obvious solution is [a] return to all-male conscription."[29] But an obvious moral alternative is to raise pay scales until enough men are willing to supply their labor for this enterprise, assuming in the first place it is a legitimate one.

14. He also opposes a woman's right to abortion on the "fundamental Kantian rule against initiating aggression."[30] He rejects the familiar Judith Jarvin Thomson analogy of someone who wakes up to find another person attached to himself, dependent upon the use of his kidneys. Levin rejects this on the grounds that "the person who withdraws his assistance is not completely responsible for the dependency on him of the person who is about to die, while the mother *is* completely responsible for the dependency of her fetus on her."[31] But this will not do. Surely the victim of rape is in no way responsible for her fetus's dependency on her. And just as surely all fetuses, whether the result of rape or not, have equal rights with one another.[32]

To sum up: I have praised the book to the skies, and then, that being my nature, have registered quite a few disagreements with it. But it should be obvious that I recommend reading this book: It is the only exhaustive, in-depth, utter refutation of the feminist argument presently in existence. Its positive contributions are great, and its flaws do not detract from its central thesis. On the contrary, they are peripheral, although interesting, issues.

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Notes

1. Michael Levin, *Feminist and Freedom* (New Brunswick, N.J.: Transaction Books, 1987).
2. For a review of Levin's book that focuses entirely on its positive elements, see my review in *Nomos* 7, no. 1 (Spring 1989): 25–26
3. Levin, p. 4. See also *ibid.*, p. 282, for another failure to object to the legal prohibition of private discrimination.
4. *Ibid.*, p. 113.
5. *Ibid.*, p. 82.
6. For a demonstration that the market would be able to reduce the accident, fatality, and injury rates on the highways, see Walter Block, "Free Market Transportation: Denationalizing the Roads," *Journal of Libertarian Studies* 3, no. 2 (Summer 1979): 208–32; idem, "Theories of Highway Safety," *Transportation Research Record,* no. 912 (1983); Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1983), pp. 202–18.
7. Levin, pp. 104; *ibid.*, pp. 41–42.
8. *Ibid.*, p. 113.
9. This, of course, is largely a matter of there being altogether too much public property and not enough private property (it is no accident that more women are raped in Central Park than in Disney World). It is also traceable to the fact that the institutions ostensibly set up to eradicate rape (the police, the courts) are unfortunately in the intrinsically inefficient public sector.
10. Levin, p. 106.
11. See Murry N. Rothbard, *Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982).
12. Levin, p. 112.
13. See W. H. Hutt, *The Strike-Threat System* (New York: Arlington House, 1973); Emerson P. Schmidt, *Union Power and the Public Interest* (Los Angeles: Nash, 1973).
14. Levin, p. 115.
15. See Rothbard, *Ethics of Liberty,* pp. 63–68. For a debate on this issue between the present author on the one hand, and Milton Friedman, David Friedman, and Paul Heyne on the other, see Walter Block, Geoffrey Brennan and Kenneth Elzinga, eds, *Morality of the Market: Religious and Economic Perspectives* (Vancouver: Fraser Institute, 1985), pp. 490–510.
16. Levin, p. 118.
17. See Thomas Sowell, "Weber, Bakke and the Presuppositions of Affirmative Action," in Walter Block and Michael Walker, eds., *Discrimination, Affirmative Action and Equal Opportunity* (Vancouver: Fraser Institute, 1982), pp. 37–63.
18. Levin, p. 143.
19. Actually, reference is presumably being made to Carl Hoffman and John Reed, "When is Imbalance Not Discrimination," in Block and Walker, op. cit., pp. 187–216.
20. Levin, p. 144.

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21. Since Levin does not quote me I cannot be sure of the exact context, but I assume his reference is to footnote 21 of "Economic Intervention, Discrimination, and Unforeseen Consequences," in Block and Walker, op. cit., pp. 246–48. This footnote stretches on for three pages, wherein I cite numerous feminist writers who give dramatic testimonial to the fear of success of many, many accomplished women. My motivation for reviewing this literature was similar to that of Sowell: I wanted to catch the women's liberationists in a contradiction. On the one hand, they explain the female-male wage gap in terms of employer sexism; on the other hand, they testify to the fear of success of many women. They utterly fail even to consider that the latter could be at least part of the cause of the wage gap.
22. Levin, p. 120.
23. *Ibid.*, p. 111.
24. *Ibid.*, pp. 194–95 and 111.
25. *Ibid.*, pp. 194–95.
26. Levin also champions academic freedom, and does not even restrict this "right" to private institutions. For a critique of his views concerning academic freedom, see Walter Block, *Defending the Undefendable* (New York: Fleet Press, 1976), pp. 54–57. He also favors the legal prohibition of blackmail (Levin, p. 261). For an alternative view, see Block, *Defending the Undefendable*, pp. 44–49, as well as Block, "Trading Money for Silence," *University of Hawaii Law Review* 8, no. 1 (Spring 1986): 57–73; and Block and David Gordon, "Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick and Lindgren," *Loyola of Los Angeles Law Review* 19, no. 1 (November 1985): 37–54.
27. Levin, p. 131.
28. An employer who engages in this practice on a large scale is of course risking bankruptcy, but that is an entirely different matter.
29. Levin, p. 229.
30. Too bad he does not take this fundamental Kantian or libertarian axiom more seriously, especially in the cases of taxation, public enterprise, and conscription.
31. Levin, p. 288.
32. For a defense of fetus eviction, not abortion, see Walter Block, "Abortion, Woman and Fetus: Rights in Conflict?" *Reason*, April 1978, pp. 18–25.

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